Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

CHARLES J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York,

Petitioner,

v.

ROBERT CHARLES REULAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the holding of the United States Court of Appeals for the Second Circuit, that a public employee's motive is not dispositive as to whether the employee's speech relates to a matter of public concern, and that his recklessly false statement about a subject related to his job and made for purely personal financial reasons is protected by the First Amendment, directly conflict with rulings on this issue of this Court and other Circuit Courts?

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OPINION BELOW

The order of the United States Court of Appeals for the Second Circuit from which petitioner, Kings County District Attorney Charles J. Hynes ("petitioner" or "Hynes"), seeks certiorari, was issued on August 21, 2006. The opinion and order was reported at 460 F.3d 409, and appears in the Appendix A at pp. 1a-36a. The order affirmed the District Court's entry of judgment, after a jury trial, in favor of respondent Robert Charles Reuland ("respondent" or "Reuland").

The Second Circuit's August 21, 2006 order followed Hynes's appeal from a final judgment of the United States District Court for the Eastern District of New York (Gleeson, U.S.D.J.) filed September 24, 2004 which, following a jury trial, granted Reuland's motion pursuant to Federal Rules of Civil Procedure 50(b), denied Hynes's Rule 50(b) motion, and awarded judgment to Reuland in the amount of $30,000. The judgment was entered following the District Court's memorandum and order dated September 17, 2004, reported at 2004 U.S. Dist. Lexis 18784, wherein the District Court concluded that Reuland's statement to New York Magazine addressed a matter of public concern, notwithstanding the jury's finding that Reuland's motivation in making the statement to New York Magazine was not to address a matter of public concern; that Reuland's speech was entitled to great weight, and that the value of the statement to New York Magazine outweighed whatever disruption Hynes alleged; and that Hynes was not entitled to the defense of qualified immunity in demoting Reuland on the basis of his statement, in that Hynes's actions were not objectively reasonable. The District Court's memorandum and order are reproduced in the Appendix B at pp. 37a-58a.

A grant of certiorari in this case would also bring up for review the Second Circuit's summary order filed December 26, 2002, reported at 53 Fed. Appx. 594, affirming the District Court's order denying Hynes's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), which rejected Hynes's claim of qualified immunity on that record. By memorandum and order dated June 17, 2004, reported at 2004 U.S. Dist. Lexis 11061, the District Court denied Hynes's motion for summary judgment, declining to rule as a matter of law that the speech in issue did not address a matter of public concern, and ruling instead that Hynes's alleged adverse employment action, for engaging in speech on a matter of public concern, constituted unlawful retaliation, and was not objectively reasonable. Copies of the Second Circuit's and District Court's interlocutory orders are reproduced in the Appendix E, F and G at pp. 65a-104a.

JURISDICTION

The Second Circuit issued the opinion and order from which Hynes seeks certiorari on August 21, 2006. Hynes timely filed a petition for rehearing or rehearing *en banc* in the United States Court of Appeals for the Second Circuit on September 1, 2006. The Second Circuit's order denying rehearing was issued on February 26, 2007 (Appendix H, at pp. 105a-106a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

This petition has been filed within the time allowed by law, pursuant to Rule 13.1 of the Rules of this Court.

CONSTITUTIONAL PROVISION

First Amendment, United States Constitution

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . (Appendix I, at p. 107a).

SUMMARY OF THE ARGUMENT

A public employee's deliberately or recklessly false statement that is specifically related to his or her job, made without any belief of a basis in fact, is not protected speech under the First Amendment. This Court has apparently never considered the precise issue of "whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment." *Pickering v. Board of Education*, 391 U.S. 563, 575 n.6 (1968).

In *Connick v. Myers*, 461 U.S. 138, 147 (1983), this Court observed that "an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge," even if the same remark made by a person on the street would not be actionable in a libel suit. The Second Circuit erred in concluding that Reuland's false statement to New York Magazine, purportedly about the murder rate in Brooklyn, constituted speech on a matter of public concern. Whether a speaker's motive is dispositive on the issue of whether the speech addresses a matter of public concern is an issue on which there is a split in authority among the Circuit Courts, which should be resolved by this Court. This Court should hold that such motive is dispositive.

At the very least, because the law in this area is not settled. Hynes was entitled to qualified immunity, based upon his objectively reasonable employment decision to demote Reuland on the basis of Reuland's patently false, hyperbolic statement to New York Magazine. It was objectively reasonable for Hynes to believe that because Reuland was motivated by a desire to sell his book, Reuland's recklessly false statement was not protected speech, or speech on a matter of public concern.

STATEMENT OF THE CASE

In this civil rights action brought under 42 U.S.C. § 1983, Reuland, a former assistant district attorney, alleged that in retaliation for his writing a book, as well as his exercise of other First Amendment speech rights, he suffered adverse employment action.

In early January, 1997, Hynes appointed Reuland as an assistant district attorney in the Kings County District Attorney's Office. In June 2000, he was assigned to the Homicide Bureau (3a).[1]

In 2000, Reuland secured a contract with Random House, Inc., to publish his novel, "Hollowpoint." As part of the presale publicity of "Hollowpoint," Reuland interviewed with a number of publications, including New York Magazine. In its February 26, 2001 issue, New York Magazine quoted Reuland as stating (4a):

> Brooklyn is the best place to be a homicide prosecutor. . . . We've got more dead bodies per square inch than anyplace else.

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[1] Numbers in parentheses refer to page numbers of the Appendix.

Reuland met with Hynes on March 9, 2001, and alleged, *inter alia*, that Hynes told Reuland that Reuland's remarks published in the February 26th issue of New York Magazine undercut Hynes's public message that Brooklyn no longer had any violent crime; accused Reuland of seeking to work in the Homicide Bureau to "sell books"; and offered Reuland the option of demotion from the Homicide Bureau, or termination of employment. In mid-March 2001, Reuland was reassigned from the Homicide Bureau to the Orange Zone, a trial unit within the District Attorney's Office that handles a number of different types of criminal matters, including homicides.

Reuland thereafter wrote the following letter to the editor of New York Magazine, about the reduction of the homicide rate in Brooklyn, which was published in the April 2, 2001 issue, under the heading of "Body Count" (4a):

> Thanks to Cameron Stracher for making the most of a rather dull subject: New York's "young legal guns," a category in which I was included ["Raising the Bar," February 26]. While Mr. Stracher correctly quotes me as referring to Brooklyn, where I live and work as a homicide prosecutor, as having "more dead bodies per square inch than anyplace else," this was not intended to be, nor is it, literally true. In fact, Brooklyn's murder rate has declined more than 66 percent over the past decade. Even with the remarkable reduction, the loss of life remains high and still keeps a homicide prosecutor busy – the point of my hyperbolic remark.

On July 16, 2001, Reuland requested that he be transferred back to the Homicide Bureau. Reuland's transfer request was denied, and he was advised that his work performance in the Orange Zone had been substandard and unacceptable. On July 20, 2001, Reuland resigned his position in lieu of termination.

On or about August 21, 2001, Reuland filed a summons and complaint under 42 U.S.C. § 1983, alleging that Hynes had violated his First Amendment right to freedom of speech. Hynes interposed an answer on or about November 2, 2001 (5a).

On or about December 28, 2001, Hynes moved pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings. By order filed April 12, 2002, the District Court (Gleeson, U.S.D.J.) denied Hynes's motion to dismiss the complaint, rejecting Hynes's claim of qualified immunity based upon an insufficient factual record (103a-104a).

Hynes appealed to the Second Circuit from the District Court's denial of his motion to dismiss, on the issue of qualified immunity. By summary order filed December 26, 2002, the Second Circuit affirmed the District Court's order denying Hynes's motion for judgment on the pleadings (99a-102a).

Hynes thereafter moved for summary judgment, and by memorandum and order dated June 17, 2004, the District Court denied Hynes's motion for summary judgment. The District Court declined to rule as a matter of law that the speech in issue did not address a matter of public concern, and further denied Hynes's motion seeking qualified immunity (65a-98a).

Jury Trial and Verdict

A jury trial was held on July 12, 13, 14 and 15, 2004. On July 14, 2004, the jury rendered a special verdict on liability (61a-64a).

As to Reuland's motivation, the jury found that Reuland failed to prove by a preponderance of the evidence that one of his motivations in any of the three instances of speech that were the subject of his complaint (writing the novel "Hollowpoint," making the statement to New York Magazine, or making the statement to Hynes at their meeting on March 9, 2001) was to address a matter of public concern. As to Hynes's motivation for the demotion, the jury found that Reuland proved that his statement to New York Magazine was a substantial or motivating factor in Hynes's decision to demote him out of the Homicide Bureau (but was not with respect to "Hollowpoint" or the March 9, 2001 statement). The jury further found that Hynes did not prove that he would have demoted Reuland in any event because Hynes believed Reuland had lied to him. Finally, the jury found that Reuland failed to prove that any of the speech in issue ("Hollowpoint," the New York Magazine statement, or the March 9, 2001 statement) was a substantial or motivating factor in Hynes's decision to terminate him (61a-64a).

On July 15, 2004, the District Court instructed the jury to consider whether Reuland was entitled to damages for the demotion, assuming that the demotion was wrongful conduct in retaliation for the statement to New York Magazine (see District Court trial transcript at p. 567, reproduced in the Joint Appendix filed in the Second Circuit, at A683). Based upon that assumption, the jury found that Reuland proved by a preponderance of the evidence that he was entitled to actual or compensatory damages for pain and suffering, based upon Hynes's decision to demote him, in the amount of $30,000, and that Reuland was not entitled to punitive damages (59a-60a).

District Court Judgment, and Memorandum and Order

By judgment filed September 24, 2004, the District Court granted Reuland's motion pursuant to Fed. R. Civ. P. 50(b); denied Hynes's motion; and entered judgment in favor of Reuland and against Hynes, in the amount of $30,000 (58a-59a).

In its accompanying memorandum and order dated September 17, 2004, the District Court concluded that despite the jury's finding that Reuland did not make the statement in his interview to New York Magazine to address a matter of public concern, that statement nevertheless addressed a matter of public concern, and was protected speech, notwithstanding Reuland's motivation. In applying the *Pickering* balancing test, the District Court ruled that even accounting for the jury's finding as to Reuland's motivation, the value of the speech outweighed whatever disruption Hynes alleged. Finally, the District Court ruled that Hynes was not entitled to qualified immunity, based upon the jury's findings as to Hynes's own motivation. As the jury found that Hynes acted with an intent that is prohibited by law, he was not entitled to qualified immunity (37a-58a).

The Decision of the United States Court of Appeals for the Second Circuit

In a 2-1 decision entered August 21, 2006, the United States Court of Appeals for the Second Circuit agreed with the District Court's ruling, and held that the speaker's motive is not dispositive in determining whether speech is on a matter of public concern, and that Reuland's statement addressed a matter of public concern. The Court also held that Hynes was not entitled to qualified immunity, because it was not objectively reasonable for him to believe that the speech was unprotected, and the jury found that he acted with improper retaliatory motive (1a-36a).

The Court also found that the fact that Reuland's statement was not literally true does not automatically deprive it of First Amendment protection, noting that false speech and hyperbole are still entitled to First Amendment protection, as long as the statements are not made knowingly or with reckless disregard of their falsity (8a-10a).

On the issue of whether the speech in issue constituted a matter of public concern, the Court, relying on *Connick v. Myers*, 461 U.S. 138 (1983), and *United States v. National Treasury Employees' Union*, 513 U.S. 454 (1995), held that the speaker's motive, while one factor that may be considered, is not dispositive as to whether the speech addressed a matter of public concern. The Court opined that the fact that Reuland's motivation was to sell books did not mean that his speech did not address a matter of public concern (12a-18a).

The Second Circuit noted that other Circuits that have considered the role of the speaker's motive on the issue of public concern have "almost uniformly" found that motive is not dispositive, and that only the Tenth Circuit has potentially treated motive as dispositive, while not expressly so holding (15a-17a). The Second Circuit then opined (17a):

> We join the majority of circuits in finding that the speaker's motive is not dispositive as to whether an employee's speech relates to a matter of public concern. Therefore, the jury's finding that Reuland was not motivated by a desire to address a matter of public concern does not resolve the issue.

The Second Circuit further concluded that as Reuland's statement addressed the crime rate in Brooklyn, and crime rates are inherently a matter of public concern, Reuland's statement to New York Magazine, which was not made simply to co-workers about employment matters, addressed a matter of public concern (17a-18a).

On the *Pickering* balancing, the Court also ruled that Hynes waived the issue of the disruption the speech caused to the workplace, by agreeing not to submit that claim to the jury (18a-20a).

Finally, in concluding that Hynes was not entitled to qualified immunity, the Court found that it would not have been objectively reasonable for Hynes to believe that he could demote Reuland in retaliation for his hyperbolic statement to New York Magazine, and Hynes did not request that the jury decide if he was motivated by disruption rather than by retaliation (20a-23a).

Judge Winter dissented on the grounds that a prosecutor's public statement about homicide rates is not protected by the First Amendment when it was admittedly false, admittedly made without any belief of a basis in fact, and made to promote sales of the prosecutor's novel (24a-36a). Judge Winter reiterated that a knowing or recklessly false statement of fact is not protected by the First Amendment, and that Reuland admitted that he never intended the hyperbolic statement as truth, and never claimed that it was supported by any factual basis (24a-30a). Moreover, the jury found that Reuland failed to prove that one of his motivations was to address a matter of public concern (29a-30a). Finally, Judge Winter concluded that because no clearly established right was violated, Hynes should be entitled to qualified immunity, as it was not unreasonable for Hynes to believe that Reuland's statement was recklessly false, especially after Reuland could point to no factual basis for asserting it (36a).

Petition for Rehearing or Rehearing En Banc

On September 1, 2006, Hynes timely moved for rehearing or rehearing *en banc*, arguing that Hynes was entitled to qualified immunity, as it was not clearly established that Reuland's recklessly false statement to New York Magazine was protected speech under the First Amendment; the recklessly false statement was not protected by the First Amendment, nor did it address any matter of public concern, even if it misinformed the public about the crime rates in Brooklyn; and that Reuland's recklessly false statement, when he spoke as a presumably knowledgeable homicide prosecutor purporting to provide information about homicide rates, was not protected speech.

By order filed February 26, 2007, the Second Circuit denied Hynes's petition for rehearing or rehearing *en banc* (105a-106a).

REASONS FOR GRANTING THE PETITION

This petition for a writ of certiorari raises a compelling and novel question of vital importance to governmental employers, and apparently one of first impression in this Court, regarding whether a public employee's recklessly false statement is protected by the First Amendment to the United States Constitution, and can constitute speech on a matter of public concern.

This petition also raises the issue of the role a speaker's motive plays in determining whether the speech in issue addressed a matter of public concern. The Second Circuit has acknowledged in this case that there is a potential split among the Circuit Courts as to whether a speaker's motive is dispositive on the issue of whether the employee's speech relates to a matter of public concern. This Court should consider and resolve the significant question of whether the speaker's motivation is dispositive of the public concern issue.

Finally, this petition also raises the significant issue of an employer's entitlement to qualified immunity as a matter of law, where the employment decision being challenged was objectively reasonable, based upon the disciplined employee's purely personal motivation in making a recklessly false statement that was not protected speech, or speech on a matter of public concern; and there is a split in authority among the Circuit Courts as to whether an employee's motivation is dispositive of the public concern issue.

A. The Speaker's Motive Is Dispositive Of The Public Concern Issue; The Second Circuit's Ruling To The Contrary Has Created A Split In Authority Among The Circuit Courts On This Issue

Relying on this Court's rulings in *Connick v. Myers*, 461 U.S. at 140-41, and *United States v. National Treasury Employees' Union*, 513 U.S. at 465, the Second Circuit panel majority held here that motive is not dispositive as to whether an employee's speech is a matter of public concern (12a-14a), and the fact that his motivation was to sell books did not mean that his speech did not address a matter of public concern (14a). The Second Circuit found that the speaker's motive alone is not dispositive of the public concern issue, especially where, as here, the motive does not involve an employment grievance (15a).

The Second Circuit thereupon affirmed the District Court's ruling that Reuland's statement to New York Magazine constituted protected speech under the First Amendment, notwithstanding the jury's determination that Reuland's motivation in making the statement to New York Magazine was not to address a matter of public concern (41a, 49a, 51a-53a, 61a-62a). Hynes does not dispute the jury's finding that Reuland did not intend to address any matter of public concern, in making the statement to New York Magazine. The District Court concluded that despite the jury's finding that Reuland did not make the statement to New York Magazine to address any matter of public concern, that statement nevertheless addressed a matter of public concern, thereby finding that Reuland's statement to New York Magazine remained protected despite his motivation in making it (41a, 49a, 52a-53a). The Second Circuit's affirmance of that ruling, notwithstanding the jury's verdict, creates a conflict in authority among the Circuit Courts on this issue.

There is a split among the Circuit Courts on this issue, which this Court should now resolve. Of the cases in other Circuits cited by the Second Circuit panel majority, concluding that motive is not dispositive on the issue of public concern, four of those cases were decided after the date of the action complained of in this case, which occurred in March, 2001. *See Tripp v. Cole*, 425 F.3d 5, 11 (1st Cir. 2005); *Markos v. City of Atlanta*, 364 F.3d 567, 572-73 (5th Cir. 2004); *Anderer v. Jones*, 385 F.3d 1043, 1053 (7th Cir. 2004), *cert. denied*, 546 U.S. 1032 (2005); and *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 925 (9th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005). Moreover, the Second Circuit acknowledged the existence of a potential split in the Circuit Courts on this issue, noting that the Tenth Circuit had indicated in 1990, years prior to the demotion in this case, that the speaker's subjective intent is controlling in determining whether the speech is on a matter of public concern. *See Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990). Even the Second Circuit had previously opined that "the fact that an employee's speech touches on matters of public concern will not render that speech protected where the employee's motive for the speech is private and personal." *See Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994); *see also Lewis v. Cowen*, 165 F.3d 154, 163-64 (2d Cir.), *cert. denied*, 528 U.S. 823 (1999) (in determining whether speech addresses a matter of public concern, "the court should focus on the motive of the speaker" and attempt to determine whether the speech was for personal reasons, or whether it had a broader public purpose).

This Court should now resolve the split in authority among the Circuit Courts on this important issue, as to whether an employee's speech that is intended to promote purely personal interests, constitutes speech on a matter of public concern, notwithstanding the employee's admittedly personal and self-promoting motivation.

B. Recklessly False Speech Is Not Speech On A Matter Of Public Concern, And Is Not Protected By The First Amendment

This Court has apparently never considered the precise issue of "whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment." *Pickering v. Board of Education*, 391 U.S. 563, 575 n.6 (1968). In *Pickering*, this Court held that absent proof of false statements knowingly or recklessly made, a public employer (there, a teacher) may not be disciplined or dismissed for speaking on issues of public importance. *Id.* at 574.

Unlike the situation in *Pickering*, 391 U.S. at 572, the evidence in this case demonstrated that Reuland, while an assistant district attorney in Brooklyn, recklessly made a false statement about the homicide rate in Brooklyn, a statistical and purported factual, admittedly hyperbolic, statement that was closely related to the day-to-day operations of the District Attorney's office, and about which Reuland would be presumed to have specialized and particularized knowledge. In *Garcetti v. Ceballos*, __ U.S. __, 126 S. Ct. 1951, 1962 (2006), this Court rejected the principle that the First Amendment shields from discipline the statements public employees make pursuant to their professional duties, and declined to recognize the existence of a constitutional cause of action behind every statement a public employee makes in the course of his or her employment. *Id.* In *Connick v. Myers*, 461 U.S. at 147, this Court observed that "an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge," even if the same remark made by a person on the street would not be actionable in a libel suit.

This case thus squarely presents the novel issue of whether knowingly or recklessly false speech is protected by the First Amendment, and could be deemed speech addressing a matter of public concern. The Second Circuit panel majority ruled that Reuland's statement was not deprived of First Amendment protection simply because it was not entirely accurate. However, this Court has opined that "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

This and other Courts have concluded that a knowingly or recklessly false statement of fact is not protected by the First Amendment. *See Gertz*, 418 U.S. at 340; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988); *Pugel v. Board of Trustees*, 378 F.3d 659, 668 n.9 (7th Cir. 2004)(false and recklessly made speech may not be protected by First Amendment, even if it purports to address matters of public concern); *Stanley v. City of Dalton*, 219 F.3d 1280, 1291 n.18 (11th Cir. 2000)(knowingly or recklessly false statements are not entitled to First Amendment protection); *Dill v. City of Edmond*, 155 F.3d 1193, 1202 (10th Cir. 1998)("deliberately or recklessly false statements do not receive First Amendment protection").

In *Gertz*, this Court held that publishers or broadcasters of defamatory falsehoods that are injurious to private individuals may be found liable in damages for wrongful injury to reputation, based upon evidence of fault. The case at bar does not involve defamation to a private citizen, as in *Gertz*; nor does it concern a public official seeking damages for a defamatory falsehood relating to his or her official conduct, absent proof of "actual malice," as in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); nor does it involve a public figure seeking damages for the tort of intentional infliction of emotional distress, absent proof of a false statement of fact made with "actual malice," as in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56-57 (1988); nor does it involve a teacher's right to speak on issues of public importance, absent proof of false statements knowingly or recklessly made, as in *Pickering*, 391 U.S. at 574-75. In finding that Reuland's recklessly false statement was entitled to First Amendment protection, the Second Circuit panel majority relied on *Sullivan*, *Hustler Magazine, Inc.*, and *Pickering* (8a-9a), all of which are inapposite to the issue presented here, which concerns whether a public employee's knowingly or recklessly false statements are entitled to Constitutional protection, even in the absence of evidence of resulting harm.

Contrary to the Second Circuit panel majority's holding (10a), Reuland's recklessly false statement to New York Magazine was not protected by the First Amendment. The evidence demonstrated that Reuland's statement was not only false, but that it was deliberately made with reckless disregard of its falsity. Reuland conceded that his statement was false, in that it was not intended to be, nor was it, "literally true," and that he never attempted to support or verify his statement about the homicide rate in Brooklyn.

To conclude that Reuland's statement was not deprived of First Amendment protection, the panel majority went far afield and outside the evidentiary record to find a shred of support that the statement was not made with knowledge or reckless disregard of its falsity (9a-10a). While a State agency report accessed on the internet might support the panel majority's hypothesis, Reuland's own testimony did not. To the contrary, as Judge Winter concluded in his dissent, such a statement is not constitutionally protected, where as here it was admittedly false, admittedly made without any belief of a basis in fact, and made to promote Reuland's own book sales (24a, Winter, J., dissenting). Reuland, by his own admission, made the purported statement of fact with knowledge that it was false, and with reckless disregard as to whether or not it was true. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. at 56. There is no constitutional protection for knowing or recklessly false statements of fact, including intentional lies or recklessly careless errors. *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 340. The evidence in this record amply demonstrates, contrary to the Second Circuit panel majority's determination, that Reuland was intentionally and recklessly deceptive in his asserted factual statement to New York Magazine, which is accordingly not protected by the First Amendment under this Court's well-settled precedent. Speech made with knowledge of its falsity or with reckless disregard of whether it was false or not, whether stated plainly or hyperbolically, is not speech protected by the First Amendment.

Moreover, the statement in issue was not intended to, nor did it, address any matter of public concern. As this Court opined in *Connick v. Myers*, 461 U.S. at 147, the employee must speak "as a citizen upon matters of public concern," not simply "as an employee upon matters only of personal interest." Reuland's false statement to the New York Magazine was quintessentially and solely of personal interest to him in his efforts to publicize his upcoming crime novel. A statement does not attain public concern status because its subject matter could, in different circumstances, have been a topic of a communication to the public that might be of general interest. *Id.* at 148 n.8. Reuland's statement did not enlighten the public about Brooklyn's homicide rate, since the statement was admittedly hyperbolic, was not statistically accurate, and was never intended to be the literal truth, or to constitute speech on a matter of public concern.

Reuland was not expressing his viewpoint on matters of general interest as a private citizen, but rather, was purporting to inform the public, or rather, purposefully misinform, about homicide rates, and was capitalizing on his presumably specialized knowledge of such statistics as a homicide prosecutor, in order to promote the imminent publication of his crime novel. Reuland's self-serving misinformation to the public, without regard to whether there was a factual foundation for his statement, does not constitute speech by a citizen on a matter of public interest. Reuland admittedly never intended the statement to be the truth, and never asserted a factual basis for it. As a homicide prosecutor, he carelessly and recklessly made a false public statement about a matter, the homicide rate in Brooklyn, that is closely related to the daily operations of the Kings County District Attorney's office, and about which he would be perceived by the public as having particular knowledge and special access to the facts. A public employee who purposely or recklessly misinforms the public about a fact specifically related to his area of expertise, for the sole purpose of profiting financially, is not entitled to monetary damages based upon a perceived violation of his First Amendment rights. This Court has apparently never ruled on the significant issue of whether a public employee's deliberately or recklessly false statement on a subject that is specifically related to his or her job and area of expertise, and made without any belief of a basis in fact, is protected under the First Amendment. This issue is of exceptional importance, and one of first impression. This Court recently noted that employers have a "heightened interest[] in controlling speech made by an employee in his or her professional capacity," because supervisors need to "ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Garcetti*, 126 S. Ct. at 1960.

C. Petitioner Hynes Is Entitled To Qualified Immunity

At the very least, Hynes should have been accorded qualified immunity. Since the law in March 2001 did not put Hynes on notice that his conduct in demoting Reuland on the basis of Reuland's false statement to New York Magazine would be clearly unlawful, and there is a split in authority among the Circuit Courts on the issue of whether the speaker's motivation is controlling in determining the protected status of speech, qualified immunity is appropriate as a matter of law. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001).

Contrary to the Second Circuit's conclusion, Hynes reasonably believed that Reuland's statement was not protected because it was not true; and Hynes could have reasonably assumed that Reuland's motivation in making the statement, to advance Reuland's purely personal interests in advertising and selling his novel, as the jury found, was dispositive on the issue of whether the speech was protected. It was certainly objectively reasonable for Hynes to believe that because Reuland was motivated by a desire to sell books, his recklessly false statement, widely disseminated in New

York Magazine, was not protected speech on a matter of public concern.

Government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The defense of qualified immunity turns primarily on objective factors, depending upon the objective reasonableness of an official's conduct, as measured by reference to clearly established law. *Id.* at 818-19.

Here, even the panel of Judges of the Second Circuit assigned to this case disagreed on the objective reasonableness of Hynes's demotion of Reuland, and the objective reasonableness of Hynes's belief that Reuland's statement to New York Magazine was not protected speech. Hynes, not intending to violate Reuland's constitutional rights, could have, and did, objectively reasonably perceive that he could demote Reuland on the basis of Reuland's recklessly false statement.

Moreover, in ruling that the speaker's motive was not dispositive as to whether the speech related to a matter of public concern, the Second Circuit specifically noted that it was now "join[ing] the majority of circuits in finding that the speaker's motive is not dispositive" of the public concern issue (17a). If the Second Circuit felt compelled to affirmatively declare its alliance with those other Circuits on this issue at this late date, in August, 2006, then the law on this issue could not have been as well-settled, clear and obvious as the Court asserted, at the time of Hynes's action in 2001, to deprive Hynes of qualified immunity. Indeed, many of the cases cited by the Second Circuit on the issue, dating from 2004 and 2005 (15a-17a), concluding that the speaker's motive is not dispositive in the public concern analysis, were decided well after Reuland's demotion in 2001. The one case cited by the Second Circuit that ruled otherwise, that the speaker's subjective intent is controlling in determining whether the speech is on a matter of public concern (*see Schalk v. Gallemore*, 906 F.2d 495 (10th Cir. 1990)), was decided in 1990, years prior to the adverse employment action in this case. In light of the acknowledged split among the Circuit Courts on this issue, the principle that the speaker's motivation is not controlling in determining the protected status of speech is not as "clearly established" as the Second Circuit panel majority opined.

In addition, the objective unreasonableness of Hynes's action cannot be a clearcut as the Second Circuit majority assumed, to deprive Hynes of qualified immunity, where as here one Judge of the panel, just in deciding this case, strenuously disagreed on the issue of whether the statement constituted protected speech. Judge Winter found that Reuland's knowing and recklessly false statement about crime rates in Brooklyn was not protected speech, as Reuland admitted that he never intended the statement as truth, and never claimed to have a factual basis for it. Reuland was not speaking as a private citizen on matters of public interest, and the statement is not entitled to First Amendment protection in this context.

Petitioner Hynes should have been afforded qualified immunity in this case, as he reasonably believed that such recklessly false statement, made by a prosecutor seeking to capitalize on his employment in the Homicide Bureau of the District Attorney's office, in order to promote book sales, was not protected speech. It was clearly not unreasonable for Hynes to believe that the statement was deliberately or recklessly false, as Reuland admitted to him that the statement was intended to be hyperbole, and Reuland could provide no factual basis for making such a statement. Reuland's false statement to sensationalize Brooklyn's crime rate for his own personal aggrandizement, to promote sales of his crime novel, during an interview that was widely disseminated in New York Magazine, was not protected under the First Amendment, and Hynes reasonably believed such a statement would not be constitutionally insulated, thereby entitling him to qualified immunity as a matter of law.

Reuland falsely and disingenuously exaggerated the homicide rate in Brooklyn, for purposes of his own self-promotion, and to his employer's detriment. Since Hynes reasonably believed that such a recklessly false statement was not protected under the First Amendment, he was entitled to qualified immunity. The contours of Reuland's rights in this context were not clearly established, contrary to the Second Circuit's ruling, as Hynes objectively reasonably believed that Reuland's statement was not protected because it was deliberately and recklessly false, and was not supported by any statistics of which Hynes was aware. Hynes also reasonably believed that the statement did not address any matter of public concern, because Reuland's motivation in making the statement was a purely personal desire to sell books, and was not the result of any desire or intent to inform the public about then prevailing crime or homicide rates.

CONCLUSION

For the reasons set forth, petitioner Charles J. Hynes respectfully asks this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AUGUST 21, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 04-5521-cv

ROBERT CHARLES REULAND,

Plaintiff-Appellee,

v.

CHARLES J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York,

Defendant-Appellant.

Argued: October 25, 2005
Decided: August 21, 2006

Before WINTER, POOLER, and SOTOMAYOR, *Circuit Judges.*

POOLER, *Circuit Judge.*

On August 21, 2001, appellee Robert Charles Reuland filed suit against appellant Charles J. Hynes under 42 U.S.C. § 1983 claiming that his demotion within and later firing from the Brooklyn District Attorney's Office was in unlawful retaliation for his exercise of his rights under the First

Amendment. Following a trial, the jury returned a special verdict finding that: (1) Reuland had not shown that one of his motives was to address a matter of public concern; (2) Reuland had shown that his statement to *New York* magazine was a substantial or motivating factor in Hynes's decision to demote him; (3) Hynes had not shown that he would have demoted Reuland in any event because Hynes believed Reuland lied to him; and (4) Reuland had not shown that his speech was a substantial or motivating factor in his termination.

Both Reuland and Hynes brought motions pursuant to Federal Rule of Civil Procedure 50(b) seeking entry of judgment in their favor based on the jury's findings of fact. Judge Gleeson ruled that the speaker's motive is not dispositive in determining whether speech is a matter of public concern and that Reuland's statement to *New York* magazine regarding the crime rate in Brooklyn is a matter of public concern. He also found that in light of the jury's findings regarding Hynes's motivation in demoting Reuland, Hynes cannot show this action was based on the potential for disruption rather than retaliation or avoid liability based on qualified immunity. He therefore issued an order directing that judgment be entered in favor of the plaintiff.

We agree with the district court and hold that the speaker's motive is not dispositive in determining whether speech is on a matter of public concern and that Reuland's statement is a matter of public concern. We also hold that Hynes has waived the issue of disruption by agreeing not to include it in the jury charge. Finally, we hold that Hynes cannot benefit from qualified immunity because it would not have been objectively reasonable for him to believe the speech was unprotected and the jury found that he acted with improper retaliatory motive.

BACKGROUND

Reuland began working for the Brooklyn District Attorney's office in January 1997. He initially worked in the Grand Jury Bureau, and, after about three weeks, was promoted to the Red Zone, a general trial division. After about a year-and-a-half, he was promoted to Senior Assistant District Attorney.

In May 2000, Reuland signed a contract with Random House for the publication of two books, one of which was *Hollowpoint*, a fictionalized account of a Brooklyn District Attorney that Reuland had already essentially completed. Around the same time, Reuland sought promotion to the Homicide Bureau. He met with the District Attorney, Charles Hynes, to discuss this possibility on May 31, 2000. They discussed Reuland's book, which Reuland assured Hynes contained no negative information about the office. Shortly after this conversation, on June 5, 2000, Reuland was promoted to the Homicide Bureau.

Hollowpoint was published on March 27, 2001. A couple of months before, in early 2001, Reuland was interviewed in his Homicide Bureau office by a reporter for *New York* magazine for an article about young lawyers in New York. The article was published in the February 26, 2001, issue of the magazine, which became available prior to that date, and discussed Reuland's upcoming book. The article also quoted

Reuland as saying, "Brooklyn is the best place to be a homicide prosecutor" because "[w]e've got more dead bodies per square inch than anyplace else." Cameron Stracher, *Raising the Bar*, N.Y. Mag., Feb. 26, 2001, at 31.

On February 22, 2001, after the article was published, Reuland met with First Assistant District Attorney Amy Feinstein, who told him that prominent politicians were outraged over his description of Brooklyn in the article.[1] Reuland explained that he did not mean the statement to be literally true and was merely trying to explain why he enjoyed his job. He offered to write a letter to the editor explaining his remark. Feinstein and Assistant District Attorney Barry Schreiber edited Reuland's draft letter, and Hynes approved it. The letter explained that while the quote was correct:

> [T]his was not intended to be, nor is it, literally true. In fact Brooklyn's murder rate has declined more than 66 percent during the past decade. Even with the remarkable reduction, the loss of life remains high and still keeps a homicide prosecutor busy-the point of my hyperbolic remark.

The letter was published in the April 2, 2001, issue. *Letters*, N.Y. Mag., Apr. 2, 2001, at 8.

On March 9, 2001, Reuland met with Hynes, who told him that his remarks were hurtful because, as District Attorney, Hynes had actually reduced the crime rate. Reuland says he explained that from his perspective, working directly with crime victims, there was still a great deal of work to be done and that he loved working as a prosecutor in Brooklyn in part because he felt he could make a difference. Hynes was not satisfied with this explanation and accused Reuland of lying to him and seeking the promotion to the Homicide Bureau simply to sell books. Hynes told Reuland he could either accept transfer to the Orange Zone, which would constitute a demotion back to a trial bureau, or quit. Ultimately, Reuland accepted the demotion.

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[1] State Senator Marty Markowitz had contacted her to express his displeasure, and then Feinstein had told Hynes about it, who had asked her to speak to Reuland.

Reuland did not receive positive reviews of his performance while in the Orange Zone. On July 16, 2001, Reuland wrote to Feinstein to request transfer back to the Homicide Bureau. Feinstein denied this request, and, the next day, told Reuland she expected his resignation by the end of the day. Reuland sent her his resignation.

After his termination, Reuland filed suit against Hynes in the Eastern District of New York claiming adverse employment actions in retaliation for his exercise of his First Amendment right to freedom of speech. Hynes moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) and on the basis of qualified immunity, which the district court denied. *See Reuland v. Hynes*, No. 01-cv-5661 (E.D.N.Y. April 12, 2002). Hynes appealed to this Court, and we affirmed by summary order, finding issues of fact and law that precluded resolution in Hynes's favor. *See Reuland v. Hynes*, 53 Fed.Appx. 594 (2d Cir.2004). Following remand and discovery, Hynes moved for summary judgment, which the district court denied in a detailed opinion setting out numerous factual disputes that required resolution at trial. *See Reuland v. Hynes*, 2004 WL 1354467 (E.D.N.Y. June 17, 2004).

A jury trial was held, at which Hynes testified that he met with Reuland after the *New York* magazine statement was published because he wanted to know why Reuland would say something that was not supported by statistics. Hynes also testified that he decided to demote Reuland during this meeting because he believed Reuland had lied to him about his reasons for seeking a transfer to the Homicide Bureau. Hynes did not express any concern that, because Reuland's statement to *New York* magazine had been untrue, Reuland's credibility would be destroyed and he would no longer be able to function effectively as a prosecutor, as Hynes now contends.

After the conclusion of testimony, Judge Gleeson held a conference with the parties to go over the verdict form and jury charge. At this conference, defense counsel suggested the jury be asked if Hynes reasonably believed Reuland's false statement to *New York* magazine would interfere with their working relationship, a fact that could then be weighed by the court in determining the *Pickering* balance. *See Pickering v. Bd. of Ed.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The district court found that the evidence presented went only to whether Reuland had lied to Hynes about his reasons for seeking a promotion to the Homicide Bureau, not whether he had lied in general, and suggested this was "not a Pickering question, it's a causation question." Defense counsel agreed and did not object to the district court's failure to ask any questions related to disruption.

The jury found that Reuland's statement in *New York* magazine was a motivating factor in Hynes's decision to demote him, and that, absent this motivation, Reuland would not have been demoted anyway, because Hynes believed Reuland had lied to him. However, they found that the statement was not a motivating factor in Reuland's termination. The jury also found that, in making the statement, Reuland was not motivated by a desire to address a matter of public concern. On the issue of damages, the jury awarded $30,000 for Reuland's demotion and declined to award punitive damages.

Both Reuland and Hynes sought entry of judgment in their favor based on the jury's findings of fact. Judge Gleeson held that the jury's finding regarding Reuland's motive was not dispositive in determining whether that speech addressed a matter of public concern and concluded that the crime rate in Brooklyn is inherently a matter of public concern. *See Reuland v. Hynes*, 01-cv-5661, 2004 WL 2098664, at *2-7 (E.D.N.Y. Sept.17, 2004). He further held that the jury's finding regarding Hynes's motivation precluded Hynes from showing that the reason for the demotion was disruption, and from demonstrating he was entitled to qualified immunity. *Id.* at *8-9. Therefore, he entered judgment in favor of Reuland in the amount of $30,000. *Id.* at *9.

Hynes contends on appeal that (1) the jury's finding regarding Reuland's motive conclusively establishes that the statement was not on a matter of public concern; (2) regardless, the statement is not on a matter of public concern; (3) Reuland's speech interest is outweighed by the District Attorney's reasonable concern about disruption; and

(4) Hynes is entitled to qualified immunity. At oral argument and in a post-argument 28(j) letter to the court, Hynes further argues that Reuland's speech was not entitled to any constitutional protection because it was false.

DISCUSSION

I. Protection of Hyperbolic Speech under the First Amendment

We note, as an initial matter, that the fact that Reuland's statement was not literally true does not automatically deprive it of First Amendment protection.[2] False speech, as well as hyperbole, is still entitled to First Amendment protection, as long as it is not made with knowledge or reckless disregard of its falsity. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) ("The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered. . . . To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration." (internal quotations and citations omitted)); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 56-57, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (finding parody that was not reasonably believable was protected by the First Amendment). This has been a longstanding principle of First Amendment law because "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.' " *Sullivan*, 376 U.S. at 271-72, 84 S.Ct. 710 (citations omitted).

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[2] At oral argument we requested the parties submit letter briefs on this issue and whether it was raised below. We have received these briefs and given them due consideration.

The same First Amendment protection for false speech applies even in the context of public employee speech, where the government has somewhat greater latitude. *Pickering*, 391 U.S. at 574, 88 S.Ct. 1731 ("[A]bsent proof of false statements knowingly or recklessly made by him, a [public employee]'s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal. . . ."). In *Pickering*, one of the foundational Supreme Court cases in this area of law, the Court found that some of the statements at issue were false, but nevertheless accorded those statements constitutional protection, concluding that the employer's interest in preventing the speech did not outweigh the employee's interest in free speech. *Id.* at 572-73, 88 S.Ct. 1731.

Because Reuland's statement was, as all parties concede, hyperbole, to demonstrate that it is not entitled to First Amendment protection Hynes would have to show that the statement (1) would reasonably have been perceived as an assertion of fact, (2) was false, and (3) was made with knowledge or reckless disregard of its falsity.[3] *Hustler*, 485 U.S. at 56-57, 108 S.Ct. 876. He has not done so. Despite the dissent's assumption to the contrary, there is nothing in the record that would even show Reuland's statement was in fact false, let alone that he made it with knowledge or reckless disregard of its falsity.[4] Indeed, in 2000 and 2001, around the time Reuland

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[3] 3. Of course, the very definition of a hyperbolic statement is that it exaggerates the size or intensity of something. *See* Webster's Third New International Dictionary 1112 (1986).

[4] 4. The dissent makes much of Reuland's failure to provide any statistical basis for the statement, but, although the burden of proving

(Cont'd)

made his statement, Brooklyn had more homicides than any other borough of New York City as well as more violent crime per 100,000 people than any other borough. *See* New York State Division of Criminal Justice Services, 2000-2001 Crime and Justice Annual Report, Sec. 1, Part 1, *available at* http://criminaljustice.state.ny.us/crimnet/ojsa/cja_00_01/contents.htm. Therefore, we cannot conclude that Reuland's statement is deprived of First Amendment protection simply because it may not have been entirely accurate, and thus we continue the analysis under the same rubric as other public employee speech.

II. First Amendment Retaliation Law

"For over 30 years the Supreme Court has consistently held that while the government enjoys significantly greater latitude when it acts in its capacity as employer than when it acts as sovereign, the First Amendment nonetheless prohibits it from punishing its employees in retaliation for the content of their protected speech." *Locurto v. Safir*, 264 F.3d 154, 166 (2d Cir.2001). To determine whether an employee's speech rights have been violated by an adverse employment action, we first apply a two-part test.[5] *See Melzer v. Bd. of Ed.*, 336 F.3d 185,

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(Cont'd)

falsity in this context has not yet been decided by our circuit, it is far from clear that it would be on Reuland. *See Sullivan*, 376 U.S. at 271, 84 S.Ct. 710 (noting that putting the burden of proving truth on the speaker is disfavored).

[5] Under the Supreme Court's recent decision in *Garcetti v. Ceballos*, __ U.S. __, __, 126 S.Ct. 1951, 1959-60, 164 L.Ed.2d 689 (2006), before an employee's speech is entitled to First Amendment protection, we must also determine that he was not speaking pursuant to his duties as an employee. That is clearly not the case here.

193 (2d Cir.2003). First, the court determines, as a matter of law, whether the speech relates to a matter of public concern. *Id.* If so, the adverse action nevertheless does not violate the employee's rights "if the employee's speech is reasonably likely to disrupt the effective functioning of the office, and the employee is fired to prevent this disruption." *Sheppard v. Beerman*, 317 F.3d 351, 355 (2d Cir.2003) (citing *Jeffries v. Harleston*, 52 F.3d 9, 12-13 (2d Cir.1995)). To prevail on this second step, the government must show, under the *Pickering* balancing test, that the employee's interest in free speech is outweighed by the employer's interest in avoiding disruption. *See Melzer*, 336 F.3d at 193.

A third aspect of the retaliation inquiry deals with causation. Initially, to make out a prima facie case, the employee must show that the speech was a substantial or motivating factor in the adverse action. *Sheppard*, 317 F.3d at 355. The burden then shifts to the government to show that "it would have undertaken the same adverse employment action even absent the protected speech." *Melzer*, 336 F.3d at 193. Finally, even if the government prevails in the *Pickering* balance, "the employee may still carry the day if he can show that the employer's motivation for the discipline was retaliation for the speech itself, rather than for any resulting disruption."[6] *Id.*

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[6] The district court in this case treated these two causation inquiries as the same. This would allow the employee to avoid the *Pickering* balance and prevail only on causation. Because we assume the *Pickering* balance cannot be obviated in this fashion, these questions must in fact be different. We need not resolve the precise contours of that difference here.

III. Public concern

We first address whether Reuland's statement to *New York* magazine constituted a matter of public concern.[7] Hynes contends that because the jury found Reuland was not motivated by a desire to address a matter of public concern, his speech cannot have been a matter of public concern. We disagree. We hold that the speaker's motive, while one factor that may be considered, is not dispositive as to whether his speech addressed a matter of public concern.

Whether Reuland's speech is a matter of public concern is important because "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision. . . ." *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (citation omitted). "Speech by a public employee is on a matter of public concern if it relates 'to any matter of political, social, or other concern to the community.' " *Johnson v. Ganim*, 342 F.3d 105, 112 (2d Cir.2003) (quoting *Connick*, 461 U.S. at 146, 103 S.Ct. 1684). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48, 103 S.Ct. 1684.

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[7] In *Locurto v. Giuliani*, 447 F.3d 159, 174-75 (2d Cir. Apr.27, 2006), we recently questioned whether an off-duty employee speaking about non-work matters had to satisfy the public concern test to be entitled to protection under the First Amendment. We did not resolve that question in that case, however, *see id.* at 175, and need not do so here as Reuland was speaking to *New York* magazine about work-related matters.

The facts of the Supreme Court's decision in *Connick* indicate that motive is not dispositive as to whether an employee's speech is a matter of public concern. That case involved an assistant district attorney who had circulated a questionnaire in the office. *Id.* at 140-41, 103 S.Ct. 1684. The Court noted that her motivation in doing so was to "gather ammunition for another round of controversy with her superiors." *Id.* at 148, 103 S.Ct. 1684. Nevertheless, the Court found that one question, whether assistant district attorneys felt pressured to work on political campaigns, did address a matter of public concern. *Id.* at 149-50, 103 S.Ct. 1684. Therefore, it went on to conduct the *Pickering* balancing test. *Id.* at 150, 103 S.Ct. 1684. Because Myers's motivation for circulating the entire questionnaire was the same, if motive was dispositive, the Court would not have reached the *Pickering* balancing.[8] Therefore, the speaker's motive cannot be the only factor that we consider in deciding whether Reuland's statement is a matter of public concern.

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[8] Although in its recent decision in *San Diego v. Roe*, 543 U.S. 77, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004), the Supreme Court stated that in *Connick*, "the Court held that no *Pickering* balance was required," *id.* at 83, 125 S.Ct. 521, it is clear that the Court was referring to those questions on the questionnaire circulated by Myers that did not address matters of public concern. As the Court then explained, "*Connick* held that a public employee's speech is entitled to *Pickering* balancing only when the employee speaks 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.' " *Roe*, 543 U.S. at 83, 125 S.Ct. 521 (quoting *Connick*, 461 U.S. at 147, 103 S.Ct. 1684).

Similarly, in *United States v. National Treasury Employees Union* [hereinafter *NTEU*], the Supreme Court found the speech at issue to be a matter of public concern because "the content of the respondents' messages had nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the office in which they work. They do not address audiences composed of co-workers or supervisors; instead, they write or speak for segments of the general public." 513 U.S. 454, 465, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). Yet, at least part of the motivation for the speech at issue in *NTEU* was to receive financial compensation because the case challenged not a restriction on the speech itself, but on public employees receiving honoraria for their speech. *Id.* Thus, although Reuland's statement does not fit neatly into the citizen-employee distinction discussed in *Connick* and *NTEU*, we cannot conclude the fact that his motivation to sell books means his speech does not address a matter of public concern.

Our previous cases suggesting that the speaker's motive might indicate that the speech is not on a matter of public concern have focused primarily on private motives related to employment grievances. *See, e.g., Ezekwo v. NYC Health & Hosps. Corp.*, 940 F.2d 775, 781 (2d Cir.1991) ("Ezekwo was not on a mission to protect the public welfare. Rather, her primary aim was to protect her own reputation and individual development as a doctor."); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1060 (2d Cir.1993) ("Although [plaintiff's] First Amendment interest in filing his short-lived personnel complaint would be weak if, as the trial record strongly suggests, he took that action solely to obtain additional towing referrals, the trial court did not err in ruling the personnel complaint did at least minimally touch upon a matter of public concern."); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir.1994) (noting that private motives such as "facing termination for personal consumption of marijuana" or "trying to evade or discredit a drug testing program" might mean that employee speech advocating the legalization of marijuana was not protected). In *Ezekwo*, the only one of these cases to conclude the speech at issue was not a matter of public concern, we relied not only on the motive of the speaker, but on the content of the speech, finding that both were related to personal grievances. 940 F.2d at 781.

In *Lewis v. Cowen*, we noted that, in determining whether an employee's speech addresses a matter of public concern, "the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." 165 F.3d 154, 163-64 (2d Cir.1999). Nevertheless, consistent with our previous cases, we focused on private motives related to employment, stating that "speech on a purely private matter, such as an employee's dissatisfaction with the conditions of his employment, does not pertain to a matter of public concern." *Id.* at 164. None of these cases suggest that the speaker's motive *alone* is dispositive of the public concern issue, and this is especially true where this motive is not to address an employment grievance.

Other circuits that have considered the role of motive on the question of public concern have almost uniformly agreed with our reading of *Connick* and found that motive is not dispositive. *See Tripp v. Cole*, 425 F.3d 5, 11 (1st

Cir.2005) ("Where a public employee speaks out on a topic which is clearly a legitimate matter of inherent concern to the electorate, the court may eschew further inquiry into the employee's motives. . . ." (internal quotation marks and citation omitted)); *Markos v. City of Atlanta*, 364 F.3d 567, 572-73 (5th Cir.2004) (noting that although motivation is often relevant, it is not "the new litmus test for the matter of public concern analysis, displacing the *Connick* factors"); *Anderer v. Jones*, 385 F.3d 1043, 1053 (7th Cir.2004) ("We acknowledge that motive is relevant to the matter of public concern inquiry, though it is not dispositive." (internal quotations and alterations omitted)); *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 925 (9th Cir.2004) ("[W]e have held that motive should not be used as a litmus test for public concern; rather, content is the greatest single factor in the *Connick* inquiry." (internal quotations omitted)); *Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3d Cir.1997) ("*Connick* indicates that the speaker's motive, while often a relevant part of the context of the speech, is not dispositive in determining whether a particular statement relates to a matter of public concern."); *Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 576 (6th Cir.1997) ("[T]he motive which underlies an employee's statements is a relevant, but not necessarily dispositive factor in considering whether an employee's statements may be fairly characterized as relating to any matter of political, social, or other concern to the community." (citation and internal quotation marks omitted)); *Morris v. Crow*, 117 F.3d 449, 457 (11th Cir.1997) ("[A]n employee's *motive* for speech, while not dispositive, is a factor that must be considered in determining whether speech is a matter of public concern."); *Barnard v. Jackson County*, 43 F.3d 1218, 1226 (8th Cir.1995)

("Insofar as self-interest is found to have motivated public-employee speech, the employee's expression is entitled to less weight in the *Pickering* balance than speech on matter of public concern intended to serve the public interest." (internal quotations and alterations omitted)). Only the Tenth Circuit has potentially treated motive as dispositive, although it has not explicitly so held. *See, e.g., Schalk v. Gallemore*, 906 F.2d 491 (10th Cir.1990) ("In drawing the thin line between a public employee's speech which touches on matters of public concern, and speech from the same employee which only deals with personal employment matters, we have looked to the subjective intent of the speaker.").

We join the majority of circuits in finding that the speaker's motive is not dispositive as to whether an employee's speech relates to a matter of public concern. Therefore, the jury's finding that Reuland was not motivated by a desire to address a matter of public concern does not resolve the issue. Under *Connick*, we must consider the "content, form, and context of a given statement, as revealed by the whole record." *Johnson*, 342 F.3d at 112 (quoting *Connick*, 461 U.S. at 147-48, 103 S.Ct. 1684).

Reuland's statement addressed the crime rate in Brooklyn. We have previously held that crime rates are inherently a matter of public concern. *See Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir.1999) ("[S]peech on crime rates, police staffing, equipment shortages and related budgetary matters quite plainly involve matters of public concern."). Certainly crime is a "matter of political, social, or other concern to the community." *Johnson*, 342 F.3d at 112. In contrast to previous cases in which we considered the speaker's motive significant, Reuland's statement did not relate to employment policies or other internal workplace grievances. In addition, the statement was made in an interview with a magazine with public circulation and not simply to co-workers. We therefore have little difficulty concluding that Reuland's statement to *New York* magazine addressed a matter of public concern.

IV. Pickering Balancing

Hynes argues on appeal that he demoted Reuland because Reuland's hyperbolic statement made him untrustworthy, a quality that would undermine his effectiveness as a prosecutor. Hynes further contends that this disruption of the effectiveness of the district attorney's office outweighed Reuland's interest in the speech under the *Pickering* balance. Although this argument is not without merit, we hold that Hynes has waived the issue of the disruption by agreeing not to submit the underlying facts of his disruption claim to the jury.

Hynes presented few arguments regarding the *Pickering* balance throughout the proceedings below. Initially, in his motion for judgment on the pleadings, Hynes argued that the *Pickering* balance tipped sharply in his favor. However, on appeal from the denial of that motion to this court, Hynes argued only that the speech at issue did not pertain to a matter of public concern. Furthermore, in his motion for summary judgment, Hynes made no argument regarding the *Pickering* balance.

More importantly, Hynes explicitly waived the issue of the *Pickering* balance at the jury charge conference by agreeing that the jury need not decide whether the adverse employment actions were motivated by the potential for disruption, rather than retaliation. At that conference, Hynes's counsel suggested that the jury be asked: "did the Defendant Hynes reasonably believe that the plaintiffs false statement to the New York Magazine did or would likely interfere with the good working relationship between the plaintiff and the defendant." She suggested that this was part of the *Pickering* balancing test. Alternatively, the district court proposed to ask the jury whether Hynes demoted Reuland because he believed Reuland lied to him. Hynes's counsel attempted to broaden this to simply "he had lied period," but the court responded: "That is not what the evidence is. . . . The whole issue whether he lied to him. This really isn't . . . a *Pickering* question, it's a causation question. It is a way of focusing more precisely on your version of what caused the demotion." Rather than persist in her *Pickering* argument, Hynes's counsel replied, "I think that is right. I think what Your Honor has proposed will work." Generally, we need not consider a claim on appeal where the party advancing it consented not to submit it to the jury below. *See Coffey v. Dobbs Int'l Servs.*, Inc., 170 F.3d 323, 325 n. 2 (2d Cir.1999); *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 106-07 (2d Cir.1988) (holding that a theory of recovery pleaded but not submitted to the jury by explicit agreement need not be considered on appeal). By failing to make clear to the district court that he also wanted to raise the issue of whether Reuland's reputation for truthfulness would damage his work as a district attorney and instead agreeing to the district court's decision not to include any questions about disruption in the jury charge, Hynes affirmatively waived the issue of the *Pickering* balance.

In addition, Hynes's failure to submit the *Pickering* balance to the jury has left factual questions unresolved that would make it impossible for us to decide this issue. The jury should have resolved whether Hynes was in fact motivated by a desire to avoid disruption, rather than retaliation, and whether his concern about disruption was reasonable. *See Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 557-58 (2d Cir.2001) (finding that factual disputes underlying *Pickering* balance must be submitted to the jury). Therefore, because it was raised too late for these factual disputes to be submitted to the jury, Hynes's halfhearted attempt to revive this issue after the jury verdict in a footnote to his motion for judgment as a matter of law cannot alter our conclusion that it was waived. *See Reuland*, 2004 WL 2098664, at *6 n. 5.

V. Qualified Immunity

"Under the doctrine of qualified immunity, a government official performing discretionary functions is shielded from liability for civil damages if his conduct did not violate clearly established rights or if it would have been objectively reasonable for the official to believe his conduct did not violate plaintiff's rights." *Mandell v. County of Suffolk*, 316 F.3d 368, 385 (2d Cir.2003). However, where, as here, "specific intent is actually an element of the plaintiff's claim as defined by clearly established law, it can never be objectively reasonable for a government official to act with the intent that is prohibited by law." *Locurto*, 264 F.3d at

169. Because previous cases have recognized and defined the First Amendment right of public employees to be free from retaliation for speech on matters of public concern with reasonable clarity, Hynes would be entitled to qualified immunity only if it was objectively reasonable for him to believe that he could demote an assistant district attorney for making a hyperbolic statement regarding the crime rate without violating that right. *See Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir.2003) (noting that a right is clearly established if "(1) the law is defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has recognized the right, and (3) a reasonable defendant [would] have understood from the existing law that [his] conduct was unlawful" (citation and internal quotation marks omitted)).

First, we address whether it was objectively reasonable for Hynes to believe Reuland's statement to *New York* magazine was not a matter of public concern, either because it was false or because Reuland's motive in making the statement was to sell books. In finding that hyperbolic speech is protected by the First Amendment, we rely on well-established precedent from the Supreme Court. *See supra* Part I; *see also Hustler*, 485 U.S. at 57, 108 S.Ct. 876; *Pickering*, 391 U.S. at 574, 88 S.Ct. 1731; *Sullivan*, 376 U.S. at 271-72, 84 S.Ct. 710. Therefore, it would not have been reasonable for Hynes to believe that Reuland's statement was not protected because it was untrue.

Our conclusion that the speaker's motive is not dispositive in determining whether speech addresses a matter of public concern rests primarily on *Connick*, another well-established Supreme Court precedent. *See supra* Part III;

see also, *Connick*, 461 U.S. at 147-50, 103 S.Ct. 1684. Although it would have been reasonable for Hynes to believe that Reuland's motive would be *relevant* in determining whether his statement is a matter of public concern, this is not enough. *Connick's* command to consider the "content, form, and context" of the speech, as well as the Supreme Court's application of that test, would have suggested to any objectively reasonable government official that the speaker's motive is not dispositive. *See* 461 U.S. at 147-48, 103 S.Ct. 1684. *NTEU* also suggested that a financial motive does not mean speech is not a matter of public concern. *See* 513 U.S. at 465, 115 S.Ct. 1003. Finally, the fact that nearly every circuit to consider the issue has found motive is not dispositive should have alerted Hynes that it would not be reasonable to assume otherwise. *See Tripp*, 425 F.3d at 11; *Markos*, 364 F.3d at 572-73; *Anderer*, 385 F.3d at 1053; *Alpha Energy*, 381 F.3d at 925; *Chappel*, 131 F.3d at 576; *Azzaro*, 110 F.3d at 978; *Morris*, 117 F.3d at 457; *Barnard*, 43 F.3d at 1226. Further, we have previously held that crime rates are a matter of public concern. *See Morris*, 196 F.3d at 111. Thus, we conclude it would not have been objectively reasonable for Hynes to believe that merely because Reuland was motivated by a desire to sell books that his statement was not a matter of public concern.

Next, we consider whether it would have been objectively reasonable for Hynes to believe that he could prevail on the *Pickering* balance. Because even if the disruption outweighed the employee's speech interest, "the employee may still carry the day if he can show that the employer's motivation for the discipline was retaliation for the speech itself, rather than for any resulting disruption," Hynes would be entitled to qualified immunity on this basis only if a finder of fact determined that he had no retaliatory motive. Hynes has waived this issue by not submitting it to the jury. *See supra* Part IV. Therefore he cannot now claim qualified immunity on this basis.

Because it would not have been objectively reasonable for Hynes to believe he could demote Reuland in retaliation for his hyperbolic statement to *New York* magazine, and he did not request that the jury decide if he was motivated by disruption rather than retaliation, Hynes is not entitled to qualified immunity.

CONCLUSION

Accordingly, for the reasons set forth above, we affirm the district court's entry of judgment in favor of Reuland.

Judge WINTER dissents in a separate opinion.

WINTER, *Circuit Judge*, dissenting:

I respectfully dissent.

A prosecutor's statement to a magazine about homicide rates within his jurisdiction is not protected by the First Amendment when it was admittedly false, admittedly made without any belief of a basis in fact, and made to promote sales of the prosecutor's novel. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (noting that speech is not protected when "made with knowledge that it was false or with reckless disregard of whether it was false or not") (internal quotation marks and citation omitted). Labeling false speech "hyperbole" does not render it protected. A government employee who purposefully or recklessly misinforms the public about a fact specifically related to his area of employment responsibility in order to profit monetarily should not be rewarded by a money judgment from a federal court when he is demoted. Established First Amendment doctrine provides no support for placing the mantle of victimhood upon such an employee.

I. *The Facts*

In the course of promoting a novel he had written, the plaintiff, Reuland, gave an interview to *New York* magazine. A reader of the resultant article would have learned that Reuland was a homicide prosecutor in Brooklyn. Reuland described Brooklyn as "the best place" to hold such a job because it had "more dead bodies per square inch than anyplace else." Even though the statement was indeed hyperbolic-no reasonable person would believe that homicide rates are compiled on a "dead bodies per square inch" basis-a reasonable reader would infer that Reuland as a prosecutor had personal knowledge of crime rates in Brooklyn and elsewhere and that Brooklyn had a higher homicide rate by meaningful statistical measures than other comparable places. It was so understood by a political leader and Reuland's boss, Hynes, who were upset because it was untrue. As a result, Reuland was demoted.

My colleagues assert that there is nothing in the record to show that Reuland's statement was false or that he knew it to be, or recklessly disregarded whether it was, false.[1] The following is the state of the record. Reuland has never claimed that there was a factual basis for the statement "more . . . than anyplace else." When Reuland was challenged by

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[1] My colleagues, after criticizing me for indulging in an "assumption" as to the state of the record, go completely outside the record to find a single statistic that might support Reuland's statement. Although I believe such independent appellate research into adjudicative facts is not permissible, the need for self-defense leads me to answer. The extra-record evidence cited by my colleagues does not suggest that Reuland's statement about Brooklyn's homicide rates relative to the other boroughs and other American cities was remotely accurate. In absolute numbers, Brooklyn had 236 homicides in 2000, lower than Chicago, Illinois' 628; Los Angeles, California's 550; Detroit, Michigan's 396; Philadelphia, Pennsylvania's 319; Baltimore, Maryland's 261; and Washington, D.C.'s 239. New York Division of Criminal Justice Services, 2000-2001 Crime and Justice Annual Report, Part One: Offenses Reported/Known to Police by County (2001), *available at* http:// criminaljustice.state.ny.us/ crimnet/ojsa/cja_00_01/sec1b.pdf; Federal Bureau of Investigation, Crime in the United States -2000, Table 8: Offenses Known to Law Enforcement (2000), *available at* http:// www.fbi.gov/ucr/cius_00/ xl/00tbl08.xls. On a per capita basis, Brooklyn's homicide rate in 2000 was 9.57 per 100,000 people, lower than the Bronx (14.26); Gary, Indiana (65.21); Compton, California (57.76); New Orleans,

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Louisiana (48.28); Washington, D.C., (41.78); Detroit (41.63); Baltimore (40.08); Richmond, Virginia (36.40); St. Louis, Missouri (35.61); Birmingham, Alabama (32.53); Atlanta, Georgia (32.17); Kansas City, Missouri (25.59); Memphis, Tennessee (22.46); Chicago (21.68); Newark, New Jersey (21.20); Philadelphia (21.02); Milwaukee, Wisconsin (20.44); Dallas, Texas (19.43); Miami, Florida (18.21); Los Angeles (14.89); Cleveland, Ohio (14.84); New Haven, Connecticut (14.56); Bridgeport, Connecticut (13.62); Minneapolis, Minnesota (13.07); Tucson, Arizona (12.33); Indianapolis, Indiana (12.28); Syracuse, New York (12.22); Houston, Texas (11.77); Phoenix, Arizona (11.51); and Jacksonville, Florida (10.74). Calculated from Federal Bureau of Investigation, Crime in the United States -2000 and New York Division of Criminal Justice Services, 2000-2001 Crime and Justice Annual Report, *supra*, and population data from the U.S. Census Bureau, *Population Finder*, *available at* http://factfinder.census.gov/servlet/SAFFPopulation?_ submenuId= population_0 & _sse=on. Applying Reuland's own "per square inch" formulation, it is no surprise that both the Bronx and Manhattan had higher homicide rates per square mile than Brooklyn, which had 2.44 homicides per square mile in 2000 relative to the Bronx's 3.33 homicides per square mile and Manhattan's 4.53. Calculated from New York Division of Criminal Justice Services, 2000-2001 Crime and Justice Annual Report, and the land area of each place, Wikipedia, *available at* wikipedia.org. Brooklyn also had fewer homicides per square mile than Compton (5.29); Washington, D.C., (3.89); Baltimore (3.23); Detroit (2.85); and Chicago (2.76). Calculated from Federal Bureau of Investigation, Crime in the United States -2000, *supra*, and land area from Wikipedia, *supra*.

Hynes to provide a statistical basis for the statement[2] and

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[2] Hynes's testimony was as follows:

Q What, if anything, did you do when you saw, read this article?

A I asked to see Mr. Reuland.

Q And why was that?

A I wanted to ask him about his quotation.

Q What did you want to ask him about his quotation?

A I wanted to know why he would say something that was not supported by any statistics that I was aware of.

Q Did you in fact have a meeting with Mr. Reuland?

A Yes.

Q When did that meeting occur?

A It's probably close in time to the publication of this magazine or when he read the magazine.

Q Do you have a recollection of when that meeting occurred?

A Specifically, no.

Q It was you who initiated the meeting?

A Yes.

Q Where did it occur?

A In my office at 350 Jay Street.

Q What did you say to him at that meeting and what did he say to you?

A I said did you tell New York Magazine, then I repeated the quote, and he said yes. And I said: How could you say something like that when it's not true?

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Q What did he say?

A It's hyperbole. And I said no, it's not hyperbole, it's not true.

Q You had an understanding of what the word hyperbole means?

A I think so.

Q It means an exaggeration to make a point?

A I think that is correct.

Q Did he explain to context of his comment to you at that time?

A No, actually, he repeated hyperbole several times.

Q Did he tell you that was a quote taken in the context of a much longer and fuller interview?

A He sure did not.

Q Did he tell you that he was t[r]ying to tell the interviewer why he liked the job of being a prosecutor in the homicide bureau of your office?

A He most certainly did not.

Q He never said anything about that?

A That is correct.

Q Did he tell you that he did not intend for the comment to be literally true?

A He said it was hyperbole, so I guess that is the same thing.

Q So that's what you understood him to say?

A Yes.

* * *

A I wanted to find out-what he could tell me about this statement that was unsupportable by any statistical proof.

when he testified on his own behalf at trial,[3] Reuland would say only that the statement was "hyperbole" and that it was not intended to be true. Reuland's letter to the magazine conceded that the statement was intended to mean only that "the loss of life remains high," a clear admission that the "more . . . than anyplace else" claim was false.[4] Hynes, on the other hand, testified at trial that Brooklyn did not have the highest homicide rate "by any statistics" of which he was aware.[5]

Finally, the jury found as a fact that Reuland's purpose in making the statement was not to speak on a matter of public concern, thereby adopting the defendants' view that Reuland was seeking only to promote sales of his book.

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[3] During the trial Reuland testified that he "knew that the concern was the remark was taken literally by Mr. Hynes and by the . . . prominent politicians and I offered to make clear that the remark was not intended for its literal truth." He also testified that "I was trying to say that not statistically, we have more dead bodies per square inch if you took out a ruler and measure the borough, I simply meant there was a lot of crime in Brooklyn" and that "I tried to explain to her that I did not mean the remark for its literal truth but rather I was trying to answer the question about why I liked to be a prosecutor." When his supervisor told him Hynes was offended by his remark because, according to Reuland's testimony, Hynes "took it for literal truth," Reuland stated that "I tried to convince her that was not my intention and I think I succeeded in it."

[4] Rob Reuland, Letter to the Editor, *Body Count*, N.Y. Mag., April 2, 2001, at 8.

[5] Hynes' testimony was as follows:

Q: What did you want to ask him about his quotation?

A: I wanted to know why he would say something that was not supported by any statistics I was aware of.

II. *The Law*

The legal question then is whether a public employee's statement, (i) that is about a subject specifically related to his employment responsibilities, (ii) that is false, (iii) for which the employee had no basis in fact, and (iv) that was made for reasons of personal profit, is protected by the First Amendment.

Reuland's sole claim in this regard is that his statement was protected because it was "hyperbole." I have no quarrel with the proposition that a protected statement does not lose protection simply because it is made in exaggerated form that will be understood by reasonable listeners as such. But it is also true that unprotected speech does not gain First Amendment protection by being stated in exaggerated form. Hyperbole is not a genre of speech unto itself; instead it is a rhetorical style used in protected or unprotected speech. Hyperbole is "[e]xtravagant exaggeration that represents something as much greater or less, better or worse, or more intense than it really is or depicts the impossible as actual." Webster's Third New International Dictionary 1112 (unabridged ed.1981). As the Supreme Court has noted, protected speech cannot be deprived of protection because it is clothed in "mere[ ] rhetorical hyperbole, a lusty and imaginative expression of the [underlying protected speech]." *Letter Carriers v. Austin*, 418 U.S. 264, 286, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974). On the other hand, the rhetorical style alone cannot confer protection where it is "used in such a way as to convey a false representation of fact." *Id.* In the present case, the core meaning conveyed by Reuland's statement was not protected whether stated plainly or in hyperbolic fashion.

To be accorded First Amendment protection, Reuland's statements had to address a matter of public concern. *Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir.2004). As my colleagues state, crime rates are a matter of public concern, but it is precisely that aspect of Reuland's statement that was not just hyperbolic but false. Again, a reader would discount the "per square inch" homicide rate as an exaggeration but would believe that a core of truth existed in statistical measures known to Reuland. The words "more . . . than anyplace else" might possibly be discounted by a reader to mean "among the highest," but they cannot be discounted further without being rendered either contrary to their obvious meaning or so meaningless as not to be addressed to matters of public concern. Reuland can hardly be allowed to prevail by claiming that "more . . . than anyplace else" cannot be read as a comparison to other locales or actually meant "less . . . than anyplace else." Moreover, if no comparison was conveyed, the statement becomes meaningless-Brooklyn has "dead bodies per square inch." The issue of public concern and reckless falsity thus coincide.

There is, therefore, no societal interest served by the judgment here. There is an interest in allowing public servants to speak as citizens on matters of public interest, *Pickering v. Bd. of Ed.*, 391 U.S. 563, 569-70, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), but it is not implicated in this case. Reuland was not expressing his point of view on matters of general interest as a private citizen. Rather, he was speaking as a knowledgeable homicide prosecutor and purporting to provide the public with information about homicide rates. Nor are there any concerns over "breathing space" that might call for allowing honestly mistaken statements lest a robust public debate be deterred. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Reuland misinformed the public and did so recklessly, not caring then or later whether there was a factual basis for his statement. The quantum of helpful information available to the public from knowledgeable sources is not enhanced by such self-serving false statements.

The judgment here not only furthers no legitimate societal interests but also may have very negative consequences. At the least, it has the potential of wrongly protecting some public servants who misinform the public about the performance of public agencies, impair the performance of those agencies, and thereby betray the public trust. The effect in the case of a prosecutor's office can be particularly harmful because a dedication to accuracy in public statements and a resistance to self-aggrandizing temptations is important to the professionalism of such an office.

Existing law clearly reflects these considerations.[6] A knowing or recklessly false statement of fact is not protected by the First Amendment. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). In *Gertz*, the Supreme Court stated that

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[6] Even if Reuland had made his statement for reasons other than profit, it would still be unprotected by the First Amendment because it was knowingly or recklessly false. However, Reuland's financial interest in sales of his novel highlights the risk of protecting

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> there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S. at 270, 84 S.Ct. 710. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

Id. (addressing the issue in the context of a defamation case). *See also Nike, Inc. v. Kasky*, 539 U.S. 654, 664, 123 S.Ct. 2554, 156 L.Ed.2d 580 (2003) (citing *Gertz* for the statement that "there is no constitutional value in false statements of fact" while recognizing that such a rule might be overbroad, in an unfair business practices case) (Stevens, J., concurring); *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003)

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such false speech by public employees. The conflict of interest between Reuland as an author and the interests of the District Attorney's Office in preserving its reputation for reducing crime and for honesty is a serious one and a further reason for allowing that office to discipline an employee who behaves as Reuland did.

(citing *Gertz* in explaining that the First Amendment does not shield fraud); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (noting that "[f]alse statements of fact are particularly valueless" but "inevitable in free debate" and so should only be penalized under defamation law when the "statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.") (citations and internal quotation marks omitted); *Pugel v. Bd. of Trs. of the Univ. of Illinois*, 378 F.3d 659, 668 n. 9 (7th Cir.2004) (stating that "false and recklessly made speech may not be entitled to First Amendment protection even if it purports to touch upon matters of public interest") (citation, alteration, and internal quotation marks omitted). *Condit v. Dunne*, 317 F.Supp.2d 344, 361 (S.D.N.Y.2004) (citing *Gertz*). Reuland admitted at trial that he never intended the statement as truth and has never claimed to have had a factual basis for it.

These propositions are underlined by the analysis in *Pickering v. Board of Education*, 391 U.S. 563, 574, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Pickering was dismissed from his teaching post after sending a letter to a local newspaper that attacked the school board's handling of a bond issue. *Id.* at 566, 88 S.Ct. 1731. The board argued that Pickering's statements in the letter were false. *Id.* at 567, 88 S.Ct. 1731. The Supreme Court stated in a footnote that it found most of Pickering's statements to be "substantially correct." *Id.* at 569 n. 2, 88 S.Ct. 1731. As the allegedly false statements were about the school budget, which was publicly available and on which Pickering had no special expertise, the Supreme Court pointed out that this was not a situation in which a public employee "has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts." *Id.* at 572, 88 S.Ct. 1731. In contrast to Pickering, Reuland was not only speaking on matters as to which a reader would expect him to have special access to the facts but was also reckless, i.e., concededly knew of no factual basis for his statement.

Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), relied upon by my colleagues, is hardly authority to the contrary. That case involved a parody of an advertisement for Campari Liqueur that contained a photograph of the Reverend Jerry Falwell and a fictional interview with him, describing an alleged "drunken incestuous rendevous" between Falwell and his mother in an outhouse. *Id.* at 48, 108 S.Ct. 876. Notably, it contained a notice that this was an "ad parody-not to be taken seriously." *Id.* Falwell sued for intentional infliction of emotional distress, libel, and invasion of privacy. *Id.* at 48-49, 108 S.Ct. 876. Because the jury had found that the ad "could not reasonably have been interpreted as stating actual facts" about Falwell, *id.* at 50, 108 S.Ct. 876, he could not show that *Hustler* had made a false statement of fact about him with the requisite malice and so could not recover. *Id.* at 57, 108 S.Ct. 876. In contrast to *Hustler*, there was no parody here;[7]

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[7] Parody, unlike hyperbole, is "a literary style." Webster's Third New International Dictionary 1643 (unabridged ed.1981). A parody is chiefly a vehicle for ideas and involves speech that cannot "reasonably [be] interpreted as stating actual facts about the [subject of the parody]." *Hustler*, 485 U.S. at 50, 108 S.Ct. 876. As a consequence, it is entitled to First Amendment protection. *Id.* at 50, 108 S.Ct. 876.

Reuland's statement was factual-Brooklyn has a murder rate higher than comparable areas by meaningful statistical measures-even if hyperbolic.[8]

I therefore dissent.

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[8] It follows, of course, that, because I believe that no clearly established right of Reuland's was violated, Hynes would be entitled *a fortiori* to qualified immunity. *Mandell v. County of Suffolk*, 316 F.3d 368, 385 (2d Cir.2003) (discussing the standard for qualified immunity). I will add only that it was clearly not unreasonable for Hynes to believe that the "more . . . than anyplace else" statement was recklessly false, particularly after Reuland could provide no factual basis for it.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED SEPTEMBER 17, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 01 CV 5661(JG)

ROBERT CHARLES REULAND,

Plaintiff,

v.

CHARLES J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York,

Defendant.

Sept. 17, 2004

MEMORANDUM AND ORDER

GLEESON, J.

Plaintiff Robert Charles Reuland, a former Assistant District Attorney in Kings County, New York, brought this civil rights action pursuant to 42 U.S.C. § 1983 against defendant Charles J. Hynes, the Kings County District Attorney, seeking damages and equitable relief. Reuland claims that Hynes demoted him and later discharged him in violation of his First Amendment rights. After I denied

Hynes's motion for summary judgment, *Reuland v. Hynes*, No. 01 CV 5661, 2004 U.S. Dist. LEXIS 11061 (E.D.N.Y. June 17, 2004), the case proceeded to trial and, at the close of the evidence, the jury rendered special verdicts.

The instant motions have been brought pursuant to Federal Rule of Civil Procedure 50(b). Both sides seek the entry of judgment in their favor based on the jury's findings of fact. Specifically, Reuland seeks a judgment against Hynes for $30,000 for Hynes's having illegally demoted him. Hynes seeks a judgment in his favor on all claims. For the reasons set forth below, Reuland's motion is granted and Hynes's is denied.

BACKGROUND

The facts of the case are set forth in my decision denying Hynes's motion for summary judgment. *Id.* at *2-9. Familiarity with that opinion is assumed. I set forth here only those facts relevant to the motions at hand.

At the close of the evidence at trial, the jury answered a series of questions regarding liability. The first question, asked over Reuland's objection,[1] was, "Has plaintiff Robert Charles Reuland proved by a preponderance of the evidence that one of his motivations was to address a matter of public concern?" The jury answered "no" as to each of the three instances of speech on which Reuland based his claim:

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[1] Though Reuland's attorney objected at trial to submitting the question of Reuland's motivation to the jury, at oral argument on the summary judgment motion she proposed just that. (June 7, 2004 Tr. at 22, 24.)

Hollowpoint, Reuland's statement to *New York* magazine, and Reuland's March 9, 2001 statement to Hynes in Hynes's office. The jury was next asked, "Has Reuland proved by a preponderance of the evidence that his speech was a substantial or motivating factor in . . . Hynes's decision to demote him out of the Homicide Bureau . . .?" As to *Hollowpoint* and the March 9, 2001 statement, the jury answered "no." However, as to the statement to *New York* magazine—that "Brooklyn is the best place to be a homicide prosecutor" because" [w]e've got more dead bodies per square inch than anyplace else" (Pl.Ex. 7)—it answered "yes." The jury further found that Hynes had not carried his burden of proving that he would have demoted Reuland even in the absence of this statement.

The foregoing findings pertained only to Reuland's demotion in March 2001. As for his termination four months later, the jury found that none of the instances of Reuland's speech was the reason for Hynes's decision. The jury apparently accepted Hynes's assertion that Reuland was fired for poor performance on the job.

After hearing supplemental summations on damages, the jury returned an award of $30,000 in compensatory damages for the wrongful demotion. It declined to award punitive damages.

The issue raised by the instant motions is whether the jury's finding as to Reuland's motivation in speaking to *New York* magazine removes that statement from the protections of the First Amendment and thus defeats his wrongful demotion claim. Apparently accepting Hynes's claim that Reuland sought only to increase his book's sales, the jury found that none of Reuland's motivations in making the "more dead bodies per square inch" statement was to address a matter of public concern. I need not discuss the other instances of speech—*Hollowpoint* or the March 9, 2001 statement in Hynes's office—as the jury found that neither was a factor in Hynes's decision to demote Reuland.

DISCUSSION

A. *First Amendment Retaliation: Motivation and Public Concern*

In denying Hynes's motion for summary judgment, I observed that the subject matter of Reuland's statement to *New York* magazine—the murder rate in Brooklyn—was a matter of public concern. *Id.* at *28. However, because Reuland's motivation in making that statement was a disputed question of fact, I stopped short of holding as a matter of law that the statement addressed a matter of public concern under *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), as those cases have been construed by the Second Circuit.[2] The disputed factual issue has been determined by the jury and I must now determine whether Reuland's motivation in making this statement, which was not to address a matter of public concern, warrants a judgment in Hynes's favor.

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[2] Another impediment to ruling in Reuland's favor on that issue was procedural. Whereas Hynes had sought summary judgment on the ground, inter alia, that Reuland's statements did not address matters of public concern, Reuland had not cross-moved for summary judgment on that issue.

"Whether an employee's speech addresses a matter of public concern is a question of law for the court to decide, taking into account the content, form, and context of a given statement as revealed by the whole record." *Lewis v. Cohen*, 165 F.3d 154, 163 (2d Cir.1999). In making this determination, I must focus on motive and "attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Id.* at 163-64. The Second Circuit has held that the mere fact that a government employee takes a personal interest in the subject matter of the speech at issue does not remove it from the protection of the First Amendment, and that, as "mixed motivations are involved in most actions we perform every day[,] we will not hold plaintiffs to herculean standards of purity of thought and speech." *Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir.2003) (quotation marks and alterations omitted). Here, however, the jury found that none of Reuland's motivations in making the statement to *New York* magazine was to address a matter of public concern.

My conclusion—that the jury's finding as to Reuland's motivation does not defeat Reuland's claim—rests on two independent grounds. First, to the extent the Second Circuit has focused on the motive of the speaker, it has done so in the context of deciding whether speech addressing—at least in part—workplace grievances is protected by the First Amendment. Second, the speaker's motivation goes to how much weight the speech is given in the *Pickering* balance; it does not operate to defeat a First Amendment claim at the threshold question of whether the speech addresses a matter of public concern. I discuss each ground in turn.

1. *Motivation and Matters of Public Concern*

I begin with *Connick*, the holding of which creates a distinction between speech made as an employee and speech made as a citizen. *Connick* held "that when a public employee speaks not as a *citizen* upon matters of public concern, but instead as an *employee* upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision." 461 U.S. at 147 (emphasis added). There, Connick had circulated a questionnaire within the Office of the District Attorney for Orleans Parish, and was fired as a result. The Court said as follows about the questionnaire:

> In this case, with but one exception, the questions posed by Myers to her coworkers do not fall under the rubric of matters of "public concern." We view the questions pertaining to the confidence and trust that Myers' coworkers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court. Unlike the dissent, we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. *Myers did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others.* Indeed, the questionnaire, if

> released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, *the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors.* These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celèbre.

Id. at 148 (emphasis added, citation omitted).

Despite its conclusions regarding Myers's intent in circulating the questionnaire, the Court held that one of the questions contained therein—which asked whether Assistant District Attorneys ever felt pressured to work in political campaigns on behalf of office supported candidates—did address a matter of public concern. Given our nation's "demonstrated interest . . . that government service should depend upon meritorious performance rather than political service," the Court held that "the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal." *Id.* at 149. To emphasize, the Court held that instance of speech to be protected despite its conclusion that Connick sought only to air personal, internal grievances. After holding that instance of speech to be a matter of public concern, the Court proceeded to apply the *Pickering* balancing test. *Id.*

These portions of *Connick* support my conclusion that Reuland's statement to *New York* magazine was protected speech notwithstanding his motivation in making it. *Connick* is instructive because, despite the fact that Connick's motivation in circulating the questionnaire was "to gather ammunition for another round of controversy with her superiors," *id.* at 148, a question within that questionnaire was still held to be a matter of public concern, *id.* at 149.

The Third Circuit agrees with this reading. In *Azzaro v. County of Allegheny*, it wrote:

> *Connick* indicates that the speaker's motive, while often a relevant part of the context of the speech, is not dispositive in determining whether a particular statement relates to a matter of public concern. Myers' motive for devising and distributing her questionnaire was to defeat the proposed transfer. Despite this same motive underlying all of her questions, the Court found that some of them related to matters of public concern and some did not. If motive were dispositive, the inquiry could only have resulted in finding either that all of Myers' speech was public concern speech or that none of it was.

110 F.3d 968, 978 (3d Cir.1997) (en banc).[3]

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[3] Other circuits agree that motive is just one factor to be considered, and is not necessarily controlling, in assessing whether an employee's speech addresses a matter of public concern. *E.g.*, *Metzger v. DaRosa*, 367 F.3d 699, 702 (7th Cir.2004); *Taylor v. Keith*, 338 F.3d 639, 645 (6th Cir.2003); *Morris v. Crow*, 117 F.3d

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Appendix B

The Second Circuit's caselaw has tracked *Connick*'s distinction between a citizen commenting on matters of public concern and an employee with a personal axe to grind. In *Lewis v. Cohen*, after concluding that the plaintiff's speech was motivated by a public concern, the court wrote, "Admittedly, speech on a purely private matter, such as an employee's dissatisfaction with the conditions of his employment, does not pertain to a matter of public concern. . . . *Connick* precludes First Amendment protection for public employees when they speak 'upon matters *only* of personal interest.'" 165 F.3d 154, 164 (2d Cir.1999) (quoting *Connick*, 461 U.S. at 147).

The court's example of "speech on a purely private matter"—an employee's dissatisfaction with the conditions of his employment (i.e., the facts in *Connick*)—contrasts sharply with the facts in this case. Though the jury found that Reuland's speech was motivated by personal interest, that interest was the promotion of Reuland's novel, not

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449, 457 (11th Cir.1997); *see also O'Connor v. Steeves*, 994 F.2d 905, 913-14 (1st Cir.1993) ("Where a public employee speaks out on a topic which is clearly a legitimate matter of inherent concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the 'form and context' of the expression."). Furthermore, at least one district court in this circuit has followed the Third Circuit. *See Locurto v. Giuliani*, 269 F.Supp.2d 368, 387 (S.D.N.Y.2003) ("An individual's personal motives for speaking do not dispositively determine whether that individual's speech addresses a matter of public concern. *Cf. Lewis v. Cohen*, 165 F.3d 154, 163-64 (2d Cir.1999). . . . As a number of circuit courts have opined, a contrary rule focused on the speaker's subjective motivation would be in direct conflict with the Court's holding in *Connick*.").

dissatisfaction with the conditions of his employment. To the contrary, Reuland was expressing how much he enjoyed prosecuting homicides in Brooklyn. Nor was Reuland's statement to *New York* magazine made in the context of an office dispute; his disputes with Hynes arose only after the statement to the magazine. Finally, Reuland was not speaking as an employee, at least not in the sense that the plaintiffs in the cases described above spoke as employees.

Blum v. Schlegel, 18 F.3d 1005 (2d Cir.1994), another case on which Hynes relies, further supports the citizen-employee distinction. There, the court held that because "[v]irtually every citizen has a personal interest in matters of public concern," "[t]he determinative question is whether that interest arises from the speaker's status as a public citizen or from the speaker's status as a public employee." *Id.* at 1012. Blum alleged adverse employment actions based on speech advocating the legalization of marijuana, criticizing national drug control policy, and debating civil disobedience. *Id.* The district court had found that, given Blum's admitted personal interest in the legalization of marijuana, it was likely that he "simply was airing his own feelings about drugs and that his motivation for [the speech] was personal." *Id.* Nevertheless, the Second Circuit held that the speech was protected: "Had there been evidence that Blum was facing termination for personal consumption of marijuana or evidence that Blum was trying to evade or discredit a drug-testing program, such evidence might have supported the inference that Blum's speech was motivated by his personal interests *as a public employee*." *Id.* (emphasis added).

Ezekwo v. NYC Health & Hosps. Corp., 940 F.2d 775 (2d Cir.1991), also relied on by Hynes, is not to the contrary. There, the court held that the plaintiff's speech was unprotected where

> [h]er *complaints* were personal in nature and generally related to her own situation *within the [Harlem Hospital Center] residency program.* Our review of her prolific writings convinces us that Ezekwo was not on a mission to protect the public welfare. Rather, her primary aim was to *protect her own and individual development as a doctor.*

Id. at 781 (emphasis added); *see also White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir.1993) ("Even as to an interest that could arguably be viewed as a matter of public concern, if the employee has raised the issue solely in order to further *his own employment interest*, his First Amendment right to comment on that issue is entitled to little weight in the balancing analysis." (emphasis added)); *id.* at 1060 ("Although [plaintiff]'s First Amendment interest in filing his short-lived *personnel complaint* would be weak if, as the trial record strongly suggests, he took that action solely to obtain additional towing referrals, the trial court did not err in ruling that the *personnel complaint* did at least minimally touch upon a matter of public concern." (emphasis added)).

Reuland's speech, in contrast, was not motivated by his personal interests as a public employee, and Hynes has never argued as much. Rather, Hynes has argued throughout this litigation that Reuland made the statement to *New York* magazine as a novelist, to promote *Hollowpoint.*[4] That Reuland's employment as an Assistant District Attorney was relevant to the subject matter of the novel, would increase sales of the novel, or was a topic of conversation during the interview, is qualitatively different than a situation, like *Connick*, where an embittered public employee is, to borrow Judge Posner's phrase, "grousing about a raise," *Eberhardt v. O'Malley*, 17 F.3d 1023, 1027 (7th Cir.1994).

The case might be different if Reuland had made the statement to *New York* magazine while he was still in the Red Zone, in the hopes of securing a position in the more prestigious Homicide Bureau; or had he been recently demoted and seeking to lash out at his employer for that slight. These hypothetical fact patterns would be governed by *Connick*'s (and *Lewis*'s and *Blum*'s) mandate that an employee's speech on matters of purely personal interest are unprotected. 461 U.S. at 147. Here, however, Reuland's personal motivation was to promote *Hollowpoint*; Hynes has not even alleged, much less presented evidence to suggest, that Reuland made the statement in the context of his public employment to, for example, complain about his working conditions or avoid termination. Indeed, Reuland had no reason to complain about his employment, as, just before making the statement to *New York* magazine, he had been promoted to the Homicide Bureau, a position he had eagerly sought.

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[4] The *New York* article in which the statement appeared featured ten New York City lawyers, one of whom was Reuland. Each of the ten interviews was introduced with a different title, often depending on what field of law the interviewee practiced. So, for instance, one interview was titled, "The Public Defender," and another (not Reuland's), "The Prosecutor." (Pl.Ex. 7.) In arguing for summary judgment, Hynes relied heavily on the title of Reuland's interview, "The Novelist," in arguing that Reuland was not seeking to inform the public of a matter of public concern. Though I mention it only in passing, the title lends further support to my conclusion that Reuland did not speak as a public employee, but rather as a citizen and a writer.

My conclusion—that Reuland's statement to *New York* magazine remains protected despite his motivation in making it—finds further support in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (*"NTEU"*), where the Supreme Court addressed the issue of public employees' speech unrelated to their employment. Hynes argues, rightly, that *NTEU* is distinguishable in that here, a homicide prosecutor was discussing the murder rate in Brooklyn, while the government—employee plaintiffs in *NTEU* engaged in speech that had "nothing to do with their jobs," *id.* at 465, such as an aerospace engineer lecturing on black history and a microbiologist reviewing dance performances, *id.* at 461-62. However, while *NTEU* may not be on all fours with the case at bar, it is still very instructive.

In *NTEU*, the Supreme Court struck down a federal law prohibiting federal employees from accepting any compensation for making speeches or writing articles, "even when neither the subject of the speech or article nor the person or group paying for it has any connection with the employee's official duties." *Id.* at 457. The Court emphasized this disconnect:

> With few exceptions, the content of respondents' messages has nothing to do with their jobs and

> does not even arguably have any adverse impact on the efficiency of the offices in which they work. They do not address audiences composed of co-workers or supervisors; instead, they write or speak for segments of the general public. Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.

Id. at 465. The Court found that the plaintiffs' speeches and articles addressed matters of public concern as they "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment." *Id.* at 466.

Again, I am mindful of the fact that Reuland's statement to *New York* magazine did indeed relate to his government employment. For this reason, I do not purport to follow *NTEU.* However, many of the factors cited by the Court cut in Reuland's favor: Hynes has never alleged or presented evidence to show that Reuland's statement to *New York* magazine had an adverse impact on the efficiency of the office;[5] Reuland did not address an audience of coworkers or supervisors, but rather a public audience; and, though the interview took place in Reuland's office, the statement itself was published in *New York* magazine—outside the workplace.

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[5] In his Post Trial Memorandum of Law, Hynes halfheartedly argues, in a footnote on the last page of the brief, that, in a *Pickering* balance, Reuland's statement is "entitled to minimal weight as against the defendant's concerns about plaintiff's probity ." (Def. Post Trial Mem. Law at 8 n. 6.) This argument relates to Hynes's testimony at trial that he believed that Reuland had lied about his motives in

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The key similarity between this case and *NTEU* is motivation, and specifically financial motivation. The law the Court struck down in *NTEU* did not prohibit a government aerospace engineer from lecturing on black history, or a microbiologist from reviewing dance performances. Rather, the law unconstitutionally prohibited those employees from receiving honoraria—i.e., payments or things of value—for that speech. Therefore, the *NTEU* Court had no need to address the plaintiffs' motivation for making the speech; it was clear from the very nature of the suit. The *NTEU* plaintiffs advanced a right to speak for payment. Had their motivation been simply to address matters of public concern, they could have done so for free without triggering the prohibition.

Here, the jury rejected Reuland's argument that he made the speech to address a matter of public concern. At trial (and summary judgment), Hynes argued, based on the evidence presented, that Reuland made the statement to *New*

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seeking a promotion to the Homicide Bureau, and that Reuland had only sought that promotion to promote *Hollowpoint* . This argument—that Hynes demoted Reuland because he believed that Reuland had lied to him—was necessarily rejected by the jury, as it found that the statement to *New York* magazine was a substantial or motivating factor in the demotion decision and that Hynes would not have demoted Reuland but for that statement.

York magazine to promote *Hollowpoint*, i.e., for financial gain. *NTEU* teaches that such motivation does not necessarily take speech outside the protections of the First Amendment. I say "necessarily" because the role a speaker's motivation plays in the First Amendment inquiry turns on the particular facts of the case. For instance, in a case where an employee criticizes his or her employer's policies solely to force a raise in salary (or to avoid a reduction), *Blum*, *Lewis*, *Ezekwo*, and similar cases would be important to the court's analysis of motivation.

This is not such a case. Here, Reuland's speech occurred in a magazine with a large, public audience, published outside his workplace. He did not criticize Hynes or any other supervisor in the office. He was praising his job, not complaining about it. Nor was he seeking to effect a positive change in his employment status or avoid a negative one. Furthermore, the subject matter of his statement touched on the homicide rate in Brooklyn, clearly a matter of public concern.[6] *See Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir.1999) ("The comments . . . , which included speech on crime rates, police staffing, equipment shortages and related budgetary matters quite plainly involve matters of public concern."). Therefore, for all of the above reasons, I conclude that, despite the jury's finding that Reuland did not make the statement to *New York* magazine to address a matter of public concern, that statement nonetheless addresses a matter of public concern.

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[6] In *NTEU*, the Court did not examine the subject matter of the speech in holding that it was a matter of public concern. The Court found that the plaintiffs' speeches and articles addressed a matter of public concern as they were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to [the employees'] government employment." 513 U.S. at 466. Here, as discussed above, the subject matter of Reuland's speech clearly addresses a matter of public concern, so I need not decide whether *NTEU*' s standard for determining public concern applies here.

2. *Motivation and the* **Pickering** *Balance*

To the extent that motivation is relevant in removing speech that otherwise addresses a matter of public concern from the protections of the First Amendment, it does so not at the threshold question of whether the speech addresses a matter of public concern, but rather in the *Pickering* balance. Put another way, a purely private and personal motivation to air an employment grievance, even if that grievance addresses a matter of public concern, might reduce the value of the speech to such an extent that it is outweighed by even a relatively slight interest on the part of the public employer.

In *Lewis*, the Second Circuit rightly recognized that the extent to which speech touches on a matter of public concern is a sliding scale and affects what weight the speech is given in the *Pickering* balance. In noting the importance of the manner, time, and place of the speech in determining whether it is protected, the court wrote, "For example, the *Pickering* balance is more likely to favor the government when an employee directly confronts his supervisor with objectionable language than when an employee engages in equivalent speech on his own time and not in front of co-workers." 165 F.3d 154, 162 (2d Cir.1999). The content of the speech also affects the *Pickering* balance: "The more the employee's speech touches on matters of significant public concern, the greater the level of disruption to the government that must be shown." *Id.*

As to motivation specifically, the court was even more explicit in *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2d Cir.1993). There the court held:

> Even as to an issue that could arguably be viewed as a matter of public concern, *if the employee has raised the issue solely in order to further his own employment interest*, his First Amendment right to comment on that issue *is entitled to little weight in the balancing analysis.*

Id. at 1059 (emphasis added). *White Plains Towing Corp.* does *not* stand for the proposition that where an employee raises an issue solely to further his own employment interest, a court need not reach the *Pickering* balance. For these reasons, and, independently, for those stated in Part A.1, I now proceed to the balancing.[7]

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[7] At oral argument on the summary judgment motion, Hynes's attorney argued vigorously that, despite the instructions of *Gorman-Bakos v. Cornell Cooperative Extension*, 252 F.3d 545, 557-58 (2d Cir.2001) (holding that, where "both sides' arguments rest heavily on the proper characterization of plaintiff's speech and defendants' motives," the court should wait to come to its legal conclusions until after the factfinder has resolved the factual disputes), I should not submit the question of Reuland's motivation to the jury. At trial, it was Reuland who objected to the submission of those questions to the jury. *But see supra* note 1. Were the factual disputes mine to decide, I would find that, based on the record as a whole and the context in which the statements were made, Reuland's statement to

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B. *The* Jeffries *Factors*

That Reuland's speech addresses a matter of public concern does not end the inquiry.

> A government employer may take an adverse employment action against a public employee for speech on matters of public concern if: (1) the employer's prediction of the disruption that such speech will cause is reasonable; (2) the potential for disruption outweighs the value of the speech; and (3) the employer took the adverse employment action not in retaliation for the employee's speech, but because of the potential for disruption.

Johnson v. Ganim, 342 F.3d 105, 114 (2d Cir.2003) (citing *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir.1995)). The second *Jeffries* factor is the *Pickering* balance. *Id.*

As mentioned above, Hynes's only argument on the balancing test comes in a footnote on the last page of his Post Trial Memorandum of Law. He contends that Reuland's statement to *New York* magazine "would be entitled to

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(Cont'd)
New York magazine was made with mixed motives. One the one hand, I believe that the context of the interview shows that Reuland sought to promote his new novel, *Hollowpoint*. On the other hand, I credit Reuland's testimony that he cares about the work of prosecutors and wants to help lower the murder rate in Brooklyn. Of course, both for the reasons stated above and those in my opinion denying summary judgment, *see Reuland*, 2004 U.S. Dist. LEXIS 11061, at *22-30, this finding would not change the outcome here.

minimal weight as against the defendant's concerns about plaintiff's probity." (Def. Post Trial Mem. Law at 8 n. 6.) Hynes's argument fails most clearly for the following reason: The jury found that the statement to *New York* magazine was a substantial and motivating factor in Hynes's decision to demote Reuland. After making this finding, the jury went on to reject Hynes's argument that he would have fired Reuland in any event because he believed that Reuland had lied to him. Based on these findings, Hynes cannot show that he "took the adverse employment action not in retaliation for the employee's speech, but because of the potential for disruption," *Johnson*, 342 F.3d at 114.

As Hynes cannot satisfy that requirement, I need not actually weigh the statement to *New York* magazine against the potential for disruption. For the sake of completeness, however, I note that it is unclear what disruption Hynes suggests would follow from Reuland's speech. Put another way, I am unclear as to what disruption "concerns about plaintiff's probity" refers to. I do not suggest that having a perceived liar in the Homicide Bureau does not implicate "the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150; I suggest only that it is Hynes's burden to justify this particular demotion, *id.* at 150, and that he has failed to point to any evidence of disruption. He points only to h[illegible] belief that Reuland lied to him about his motives for seeking a promotion to the Homicide Bureau, a belief the jury apparently did not accept.

I am hesitant to weigh Reuland's speech against a suggested disruption that finds no support in the record other than Hynes's own testimony which was rejected by the jury. *Jeffries* instructs me to judge whether Hynes's prediction of the disruption that the speech would cause is reasonable. *Jones*, 342 F.3d at 114. To the extent that Hynes's argument is meant to suggest that the statement to *New York* magazine undermined his working relationship with Reuland, I find that the value of the statement to *New York* magazine outweighs that interest. The statement to *New York* magazine, on its face, criticized neither Hynes nor the office. It touched on Brooklyn's murder rate, a topic of extreme concern to the public. The statement was published in a magazine, not made in the workplace to an audience of Reuland's supervisors and colleagues. Furthermore, as a homicide prosecutor, Reuland was in a unique position to comment on the murder rate. *See Harman v. City of New York*, 140 F.3d 111, 119 (2d Cir.1998) ("'[G]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.'" (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion))). Therefore, even accounting for the jury's finding as to Reuland's motivation, the speech is entitled to great weight, at least enough to outweigh whatever disruption Hynes now alleges in footnote six of his posttrial submission.

C. *Qualified Immunity*

Hynes argues that he is entitled to qualified immunity for his actions, especially in light of the jury's finding as to Reuland's motivation. Hynes cannot benefit from qualified immunity, however, because of the jury findings as to his own motivation. Specifically, the jury found that the statement to *New York* magazine was a substantial or motivating factor in Hynes's decision to demote Reuland. The jury also found that Hynes would not have demoted Reuland but for that statement.

In cases such as this one, "where a . . . specific intent is actually an element of the plaintiff's claim as defined by clearly established law, it can never be objectively reasonable for a government official to act with the intent that is prohibited by law ." *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir.2001). Otherwise, defendants such as Hynes would be immunized "'in cases involving motive-based constitutional torts, so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds.'" *Id.* (quoting *Hoard v. Sizemore*, 198 F.3d 205, 218 (6th Cir.1999)); *accord Johnson v. Ganim*, 342 F.3d 105, 117 (2d Cir.2003) (quoting *Locurto*, 264 F.3d at 169). Therefore, as the jury found that Hynes acted with the intent that is prohibited by law, the qualified immunity defense is not available to him.

CONCLUSION

For the foregoing reasons, Reuland's motion is granted and Hynes's motion is denied. The Clerk is directed to enter judgment for Reuland in the amount of $30,000.

So Ordered.

JOHN GLEESON, U.S.D.J.

Dated: September 17, 2004
Brooklyn, New York

APPENDIX C — VERDICT SHEET: DAMAGES DATED JULY 15, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

01 CV 5661 (JG)

ROBERT CHARLES REULAND

Plaintiff,

-against-

CHARLES J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York,

Defendant.

VERDICT SHEET: DAMAGES

1. Has Reuland proved by a preponderance of the evidence that he is entitled to actual, or compensatory, damages, including damages for pain and suffering (including mental anguish, humiliation, shock, and discomfort), based on Hyne's decision to demote him?

Yes X　　　　No

If "yes," in what amount? *$30,000*

2. If you answered "no" to question 1, you must award Reuland nominal damages (not to exceed one dollar):

   Amount of nominal damages (not to exceed one dollar):

3. Has Reuland proved by a preponderance of the evidence that he is entitled to punitive damages based on Hyne's decision to demote him?

   Yes No X

   If "yes," in what amount? _________

/s/
FOREPERSON

Dated: July 15th, 2004
Brooklyn, New York

APPENDIX D — SPECIAL VERDICT SHEET DATED JULY 14, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

01 CV 5661 (JG)

ROBERT CHARLES REULAND

Plaintiff,

-against-

CHARLES J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York,

Defendant.

SPECIAL VERDICT SHEET

Reuland's Motivation

1. Has plaintiff Robert Charles Reuland proved by a preponderance of the evidence that one of his motivations was to address a matter of public concern?

A *Hollowpoint*

Yes [✓ No]

B. The statement to *New York* magazine

Yes No ✓

C. The March 9, 2001 statement[1]

Yes No ✓

Hynes's Motivation

Demotion

2. Has Reuland proved by a preponderance of the evidence that his speech was a substantial or motivating factor in defendant Charles J. Hynes's decision to demote him out of the Homicide Bureau ("Homicide")?

A *Hollowpoint*

Yes No ✓

B. The statement to *New York* magazine

Yes ✓ No

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[1] I remind you that Hynes disputes Reuland's assertion that Reuland made a statement on March 9, 2001 to the effect that more work needed to be done in regard to prosecuting homicides in Brooklyn. Reuland must prove by a preponderance of the evidence that he in fact made that statement. If he has failed to prove that fact, you should answer "no" to this question and to all others relating to the March 9, 2001 statement.

C. The March 9, 2001 statement

Yes No ✓

IF YOU ANSWERED "YES" TO QUESTION 2A OR 2B OR 2C, THEN PLEASE ANSWER QUESTION 3. IF YOU ANSWERED "NO" TO QUESTIONS 2A AND 2B AND 2C, THEN GO ON TO QUESTION 4.

3. Has Hynes proved by a preponderance of the evidence that he would have demoted Reuland in any event because Hynes believed Reuland had lied to him?

Yes No ✓

Termination

4. Has Reuland proved by a preponderance of the evidence his speech was a substantial or motivating factor in Hynes's decision to terminate him?

A. *Hollowpoint*

Yes No ✓

B. The statement to *New York* magazine

Yes No ✓

C. The March 9, 2001 statement

Yes No ✓

IF YOU ANSWERED "YES" TO QUESTION 4A OR 4B OR 4C, THEN PLEASE ANSWER QUESTIONS. IF YOU ANSWERED "NO" TO QUESTIONS 4A AND 4B AND 4C, THEN PLEASE STOP NOW.

5. Has Hynes proved by a preponderance of the evidence that he would have terminated Reuland even in the absence of any of the instances of speech?

Yes No

/s/
FOREPERSON

Dated: July 14, 2004
Brooklyn, New York

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JUNE 17, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

01 CV 5661 (JG)

ROBERT CHARLES REULAND,

Plaintiff,

-against-

Charles J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York,

Defendant.

MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

Plaintiff Robert Charles Reuland, a former Assistant District Attorney in Kings County, New York, brings this civil rights suit under 42 U.S.C. § 1983 against defendant Charles J. Hynes, the Kings County District Attorney,[1] seeking damages and equitable relief. Reuland claims that Hynes demoted and discharged him in violation of his First Amendment rights. Hynes now moves for summary judgment, arguing that (1) Reuland's speech was not a matter of public concern, (2) Reuland cannot establish a causal connection between his speech and Hynes's decision to discharge him, and (3) he is entitled to qualified immunity. Alternatively, Hynes seeks partial summary judgment on the issue of back pay. For the following reasons, the motion is denied.

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[1] Originally, Reuland's suit also included as a defendant Amy Feinstein, individually and in her capacity as Hynes's First Assistant District Attorney. Reuland recently voluntarily dismissed all of his claims against Feinstein.

BACKGROUND

The facts of this case, viewed in the light most favorable to Reuland, are as follows. During the summer of 1998, while he was employed as an Assistant District Attorney in the "Red Zone" of the Kings County District Attorney's Office,[2] Reuland began writing *Hollowpoint*,[3] a novel about a prosecutor employed in that District Attorney's Office and his investigation and prosecution of a homicide.[4] In March 2000, Reuland secured a $500,000 contract, dated May 22, 2000, with Random House, Inc. ("Random House"), to publish *Hollowpoint* and a second, unwritten novel. Under this contract, Reuland would receive premium payments if either or both of the books appeared on *The New York Times* hardcover bestseller list.[5]

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[2] The Red Zone was one of the office's general trial bureaus, and was responsible for prosecuting certain offenses within a particular section of Brooklyn. At all relevant times, Hynes was the District Attorney of Kings County.

[3] *Hollowpoint* is exhibit CC to the Declaration of Eamonn F. Foley.

[4] Though Reuland sometimes worked on *Hollowpoint* at the office, he did not do so during office hours.

In May 2000, a position opened in the Homicide Bureau ("Homicide"). Reuland, very interested in the post, sought the advice of his supervisor and friend, Sheryl Anania. Anania recommended that Reuland speak with Hynes directly regarding his desire to be assigned to Homicide. Reuland requested a meeting with Hynes, which occurred on May 31, 2000. During this meeting, the two discussed, among other things, the upcoming publication of *Hollowpoint.* Reuland told Hynes that the book was a fictionalized account of a prosecutor in a fictionalized Kings County District Attorney's Office. He also said that nothing in the novel would hurt the office. Hynes responded that he had also published a book, which had met with only mild success, and that he was seeking a publisher for a current manuscript he had written. As to the promotion, Hynes told Reuland that he would look into it. He promoted Reuland to Homicide within the week.

In January and/or February 2001, advance copies of *Hollowpoint* were distributed by Reuland and Random House, a number of which were read by members of Hynes's office, though Hynes himself did not read the book. The reaction among Reuland's colleagues and supervisors was generally favorable. Sometime in that same two-month period, and in connection with the presale publicity of *Hollowpoint*, Reuland was interviewed by *New York* magazine as part of a collection of profiles of lawyers in New York City. Reuland's profile was entitled, "The Novelist." The interview was published in the February 26, 2001 edition of the magazine and quoted Reuland as saying, "Brooklyn is the best place to be a homicide prosecutor. . . . We've got more dead bodies per square inch than anyplace else." (Foley Decl. Ex. P.)

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[5] Aside from securing contracts to publish *Hollowpoint* in various languages around the world, Reuland also optioned the television and movie rights to the novel in a July 26, 2001 agreement with Mirage Enterprises, Inc.

Within days, Amy Feinstein, Hynes's First Assistant District Attorney, told Reuland that Hynes and several local politicians were upset by the article,[6] though she believed that Reuland had meant no harm by his remark. Hynes, through Feinstein, directed Reuland to write a letter to the editor of *New York* magazine to set the record straight. Specifically, Reuland was told to write that Brooklyn did not literally have more dead bodies per square inch than anywhere else and that, in fact, crime rates in the borough were at an historic low. Reuland did so, and the letter was reviewed and edited by Feinstein and Hynes before it was sent. The letter, published in the April 2, 2001 issue of *New York*, read as follows:

> Thanks to Cameron Stracher for making the most of a rather dull subject: New York's "young legal guns," a category in which I was included ["Raising the Bar," February 26]. While Mr. Stracher correctly quotes me as referring to

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[6] One such politician identified in the record was then-New York State Senator Marty Markowitz, who wrote Reuland a letter regarding the *New York* magazine quote. (Foley Decl. Ex. Q.)

> Brooklyn, where I live and work as a homicide prosecutor, as having "more dead bodies per square inch than anyplace else," this was not intended to be, nor is it, literally true. In fact, Brooklyn's murder rate has declined more than 66 percent over the past decade. Even with the remarkable reduction, the loss of life remains high and still keeps a homicide prosecutor busy-the point of my hyperbolic remark.

(Foley Decl. Ex. R (alteration in original).)

On March 9, 2001, Hynes met with Reuland alone in Hynes's office. Hynes began the meeting by describing the increase in crime Brooklyn had experienced during Hynes's adolescence and early adulthood. This increase in crime, Hynes said, was the reason he had run for District Attorney. Hynes described Reuland's comments to *New York* magazine as "hurtful" because Hynes had promised the borough's residents that he would reduce crime, and he had succeeded in doing so. (Reuland Dep. at 220.) Reuland responded as follows:

> I said that, um, I could appreciate everything that-that you're saying, um, but from my-from my perspective as a homicide prosecutor, as somebody who has spent the last few years dealing with families of homicide victims, victims of violent crime, going out literally to their homes, to their neighborhoods, speaking with them, their supervisors, their families, speaking for them, on trial. Um, from my perspective there's-there's a

> fair amount of work to be done. And, you know, I was concerned. And this was the motivating factors [sic] behind my remark.

(*Id.* at 220-21.)

At that point, Hynes became angry and Reuland tried to defuse the situation, telling him:

> [L]ook, no, it wasn't like that. I was-I was explaining why I love being a homicide prosecutor. You can do things in this job that you can't do in any other job. You can make a difference. . . . I was saying, you know, I'd rather be in this-in this job than in any other job in the legal profession. I would rather be in this office than any other prosecutor's office.

(*Id.* at 222-23.) Hynes responded that Reuland should not be talking to the press or outsiders about office business. Hynes also said, "You sat there, you sat there in-in a chair and you told me that nothing in that book was going to hurt the office." (*Id.* at 224.) Hynes then asked Reuland whether he had sought the promotion to Homicide only to better promote *Hollowpoint.* Though Reuland denied this, Hynes expressed his disbelief[7] and informed Reuland that he was being transferred to the "Orange Zone."[8] When, the next day,

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[7] Hynes conceded in his deposition that he had no evidence upon which to base his disbelief. (Hynes Dep. at 28.)

[8] The Orange Zone is equivalent, in terms of type of work, to the Red Zone, where Reuland began his career as a prosecutor. The two zones cover different areas of Brooklyn.

Reuland refused to accept the transfer, Hynes informed Reuland, through an intermediary, that Reuland would either accept the transfer or submit his resignation.

After about four months in the Orange Zone,[9] Reuland requested, in a memorandum to Feinstein dated July 16, 2001, transfer back to Homicide.[10] When Feinstein informed Hynes of the memorandum, Hynes told her that Reuland was not going back to Homicide; rather, "it was time for him to go." (Feinstein Dep. at 15.) Feinstein therefore demanded

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[9] The events of these four months are sharply contested. For his part, Reuland claims that he was treated poorly and humiliated while in the Orange Zone. Hynes claims that Reuland's attitude and work product were unsatisfactory. For purposes of this motion. I assume Reuland's version of events to be true, but need not set forth Reuland's specific factual allegations regarding this period of time in order to decide Hynes's motion.

[10] In his Rule 56.1 statement, Hynes emphasizes that Anania, upon being made aware of the July 16, 2001 memorandum, contacted Feinstein by phone and informed her that Reuland's performance in the Orange Zone had been unsatisfactory. Anania's and Feinstein's deposition testimony differs as to the specifics of what was said during that conversation. (*Compare* Anania Dep. at 38-42 (detailing the list of problems with Reuland's performance that she had described to Feinstein during their phone conversation), *with* Feinstein Dep. at 17 (describing Anania's evaluation as briefer and more general).) It is unclear whether Reuland disputes what was said during that conversation, or the fact that the conversation occurred at all. (*See* Pl.'s Resp. to Def.'s R. 56.1 Statement at 28-29.) Therefore, for purposes of this motion, I assume that the conversation occurred, though what was said is disputed; I must resolve the conflict between Anania's and Feinstein's deposition testimony on this point in Reuland's favor.

Reuland's immediate resignation, and his employment was terminated on July 20, 2001.

DISCUSSION

A. *The Rule 56 Standard*

Under Rule 56 of the Federal Rules of Civil Procedure, the moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The substantive law governing the case identifies the facts that are material, and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is warranted only if "the evidence is such that a reasonable jury could not return a verdict for the nonmoving party." *Id.*

Moreover, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotation marks omitted); *see also, e.g., Michalski v. Home Depot, Inc.*, 225 F.3d 113, 116 (2d Cir.2000) ("[W]e . . . view [the facts] in the light most favorable to, and draw inferences in favor of, the non-moving party . . . ." (quotation marks omitted)). Once the moving party has met its burden, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial. '" *Id.* at 586-87 (quoting Fed.R.Civ.P. 56(e)).

B. *First Amendment Retaliation*

The First Amendment to the United States Constitution provides, inter alia, that "Congress shall make no law . . . abridging the freedom of speech." "The mere fact of government employment does not result in the evisceration of an employee's First Amendment rights." *Johnson v. Ganim*, 342 F.3d 105, 112 (2d Cir.2003); *see also, e.g.*, *Connick v. Myers*, 461 U.S. 138 (1983) ("[A] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968))). "Few values are more carefully and thoroughly protected than the citizen's right to speak his mind on matters of public concern without interference by the government," *Johnson*, 342 F.3d at 112 (quotation marks omitted), and therefore "'[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech, '" *Lewis v. Cowen*, 165 F.3d 154, 161 (2d Cir.1999) (quoting *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)).

On the other hand, the Supreme Court has also recognized that "the state has an interest as an employer in regulating speech by employees so as to promote the efficiency of public services performed by its employees."

Morris v. Lindau, 196 F.3d 102, 109 (2d Cir.1999) (citing *Connick*, 461 U.S. at 140). In determining whether an adverse employment action based on a government employee's speech was a constitutional violation in a given case, the court "must balance 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. '" *Id.* at 109-10 (quoting *Pickering*, 391 U.S. at 568).

However, a court will not engage in this balancing test unless the plaintiff first demonstrates by a preponderance of the evidence that "(1) the speech at issue was made as a citizen on matters of public concern rather than as an employee on matters of personal interest; (2) he or she suffered an adverse employment action; and (3) the speech was at least a substantial or motivating factor in the adverse employment action." *Johnson*, 342 F.3d at 112 (quotation marks, citations, and alteration omitted); *see also, e.g.*, *Morris*, 196 F.3d at 110 (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). "If a plaintiff establishes these three factors, the defendant has the opportunity to show by a preponderance of the evidence that it would have taken the same adverse employment action 'even in the absence of the protected conduct. '" *Id.* (quoting *Mount Healthy*, 429 U.S. at 287). I address each element below.

Appendix E

1. *Matters of Public Concern*

"Speech by a public employee is on a matter of public concern if it relates 'to any matter of political, social, or other concern to the community.'" *Johnson*, 342 F.3d at 112 (quoting *Connick*, 461 U.S. at 146). When the speech at issue cannot fairly be considered as relating to any of these matters, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146; *see also id.* (noting that *Pickering* and its progeny's repeated use of the "public concern" language reflects "the common sense realization that government offices could not function if every employment decision became a constitutional matter"). "'Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.'" *Johnson*, 342 F.3d at 112 (quoting *Connick*, 461 U.S. at 147-48). This determination, though necessarily somewhat fact-intensive, is a question of law, not fact. *E.g.*, *id.*

Here, Reuland claims that he was fired based on three instances of speech: (1) his novel *Hollowpoint;* (2) the statement he made to *New York* magazine; and (3) the statements he made to Hynes during the private meeting between the two on March 9, 2001. I address each instance of speech separately below.

a. *Hollowpoint*

In moving for summary judgment, Hynes argues that (1) Reuland has never contended in this lawsuit that *Hollowpoint* relates to a matter of public concern, and in fact disavowed that argument during oral argument in the Second Circuit,[11] and (2) in any event, it does not. Reuland responds that he never disavowed such an argument, and that the novel-by providing "a direct view into the inner workings of the criminal justice system with respect to the investigation and prosecution of the most heinous of crimes"-relates to various matters of public concern. (Pl.'s Mem. Law Opp'n Defs.' Mot. Summ. J. at 10-11.) This response, however, is not the focus of Reuland's argument. Rather, Reuland urges me to hold that the novel is protected speech regardless of whether it relates to a matter of public concern.

i. *Need* **Hollowpoint** *Be a Matter of Public Concern?*

In *Eberhardt v. O'Malley*, upon which Reuland relies for this argument, Judge Posner, writing for the court, distinguished the case of a government-employee novelist from the case of a government employee "grousing about a raise." 17 F.3d 1023, 1027 (7th Cir.1994). Though a novel may not receive as much protection as *The Federalist* papers, Judge Posner wrote, "the difference would be pertinent only to assessing the government's asserted justification for suppressing or discouraging the work." *Id.* at 1026. Based on this reasoning, Reuland argues that he need not establish that *Hollowpoint* contains speech addressing matters of public concern.

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[11] Hynes brought an interlocutory appeal from my denial of his motion to dismiss on qualified immunity grounds. *See Reuland v. Hynes*, 53 Fed. Appx. 594 (2d Cir.2002).

Eberhardt, however, was written before the Supreme Court's decision in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (*"NTEU"*), and the Second Circuit's decision in *Melzer v. Board of Education*, 336 F.3d 185 (2d Cir.2003). Both decisions cast doubt on the viability of *Eberhardt*, especially in this circuit.

In *NTEU*, the Supreme Court struck down a federal law prohibiting federal employees from accepting any compensation for making speeches or writing articles, "even when neither the subject of the speech or article nor the person or group paying for it has any connection with the employee's official duties." 513 U.S. at 457. The Court emphasized this disconnect:

> With few exceptions, the content of respondents' messages has nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the offices in which they work. They do not address audiences composed of co-workers or supervisors; instead, they write or speak for segments of the general public. Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.

Id. at 465.

Despite the absence of a connection between the *NTEU* plaintiffs' speech and their work as government employees, the Court applied *Pickering* and held that the speech fell "within the protected category of citizen comment on matters of public concern." *Id.* at 466. *But see id.* at 480 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("In contrast to some of our prior decisions, this case presents no threshold question whether the speech is of public, or merely private, concern. Respondents challenge the ban as it applies to off-hour speech bearing no nexus to Government employment-speech that by definition does not relate to 'internal office affairs' or the employee's status as an employee."). The Court found that the plaintiffs' speeches and articles addressed a matter of public concern as they "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment." *Id.* at 466.

The plaintiff school teacher in *Melzer v. Board of Education* claimed that he was fired in retaliation for his membership in the North American Man/Boy Love Association. 336 F.3d 185, 188-89 (2d Cir.2003). The court recognized that this claim diverged from the *Pickering* line of cases-"which ordinarily applies in situations involving speech directed at an employer, made at the place of employment or directly concerning the employer in some way"-in that Melzer's termination stemmed "not from something done in the workplace, but from First Amendment activities occurring outside the workplace and largely unconnected to it."[12] *Id.* at 193-94. The court therefore looked to *NTEU* for guidance:

> The [*NTEU*] Court instructed that although the situation fell outside the typical paradigm, the goal of striking an appropriate balance between employee and government interests is activated whenever the government seeks to regulate employees' protected speech, regardless of where it occurs or how closely it is related to work. Attenuation of time, place, or content of speech from the workplace is ultimately accounted for in the balancing part of the process, but those factors will not absolutely preclude government regulation.

Id. at 194. The court therefore held that use of the *Pickering* balancing test was appropriate. *Id.* at 195-96.

In sum, it is questionable whether *Eberhardt* remains good law after *NTEU.* However, I need not resolve that question, as it is not the law in this circuit. *Melzer* makes clear that *Pickering* applies in situations where the speech at issue occurs outside the workplace and is largely unconnected to it. I therefore proceed to address Hynes's contentions within that framework.

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[12] The other distinction the court noted was that Melzer's activity was not a specific instance of speech, but rather "an associational activity of which speech was an essential component." *Melzer*, 336 F.3d at 194.

ii. *Is* **Hollowpoint** *a Matter of Public Concern?*[13]

Before addressing Hynes's contention that Reuland's motivation in writing *Hollowpoint* precludes a finding that it addresses matters of public concern, *see infra* Part B.1.a.iii, I must determine in the first instance whether the book's subject matter itself addresses such matters. Reuland argues that *Hollowpoint* addresses various matters of public concern, such as the inner workings of a District Attorney's Office, how prosecutors build and prove cases, and the role of grand juries, to name a few.

As discussed above, the *NTEU* Court found that the plaintiffs' speeches and articles in that case addressed matters of public concern because they "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment." 513 U.S. at 466. Though *Hollowpoint'* s content was related to Reuland's employment, that does not take it outside the protections of the First Amendment. Indeed, in the context of this case, the fact that Reuland's speech related to his employment works in his favor, as "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Harman v. City of New York*, 140 F.3d 111, 119 (2d Cir.1998) (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion)). In other words, Reuland's position as a prosecutor enhanced the value of his speech, as he was well-situated to describe, in a fictionalized account or otherwise, the workings of the criminal justice system. In any event, the relationship of time, place, or content of the speech to the workplace "is ultimately accounted for in the balancing part of the process." *Melzer*, 336 F.3d at 194. In short, the subject matter of *Hollowpoint* relates in various respects to matters of public concern.

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[13] In affirming the denial of Hynes's motion to dismiss, the Second Circuit noted that Reuland had "explicitly disavowed" the argument that *Hollowpoint* pertains to a matter of public concern. *Reuland*, 53 Fed. Appx. at 595. The court invited me to "consider the relevance *vel non* of the record to date, including the oral argument before this Court, in further proceedings." *Id.* at 596. When I asked Reuland's counsel to explain her position, she claimed that her associate-who argued in the court of appeals-was arguing only that the Second Circuit did not need to reach the question of public concern, and was not disavowing that *Hollowpoint* was, in fact, a matter of public concern. Hynes does not press the point here. (*See* Def. Reply. Mem. at 3 (characterizing the contention that *Hollowpoint* addressed a matter of public concern as Reuland's "fall-back argument," rather than as an abandoned one).) On balance, and having listened to a recording of the oral argument, I conclude that Reuland's appellate counsel's ill-conceived (and seemingly total) reliance on *Eberhardt* should not preclude Reuland from arguing that *Hollowpoint* addresses matters of public concern.

iii. *Motivation*

Hynes next contends that *Hollowpoint* does not relate to matters of public concern because Reuland's motivation in writing it was purely financial. Hynes is correct that in deciding whether speech addresses a matter of public concern, courts must focus on motive and "attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Lewis v. Cowen*, 165 F.3d 154, 163-64 (2d

Cir.1999); *see also Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir.1994) ("It is true that the fact that an employee's speech touches on matters of public concern will not render that speech protected where the employee's motive for the speech is private and personal."); *Cahill v. O'Donnell*, 75 F.Supp.2d 264, 272 (S.D.N.Y.1999) ("The fundamental question is whether the employee is seeking to vindicate personal interests or bring to light a matter of political, social, or other concern to the community.").

The Second Circuit has held that the mere fact that a government employee takes a personal interest in the subject matter of the speech at issue does not remove it from the protection of the First Amendment, nor should it. *Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir.2003). "Mixed motivations are involved in most actions we perform every day; we will not hold plaintiffs to herculean standards of purity of thought and speech." *Id.* (quotation marks and alterations omitted); *see also Blum*, 18 F.3d at 1012 ("Virtually every citizen has a personal interest in matters of public concern; after all, each citizen is a member of the public and is, in some way, impacted by the resolution of societal problems."). In *White Plains Towing Corp. v. Patterson*, a case upon which Hynes relies, the Second Circuit formulated the test this way:

> Even as to an issue that could arguably be viewed as a matter of public concern, if the employee has raised the issue *solely* in order to further his own employment interest, his First Amendment right to comment on that issue is entitled to little weight in the balancing analysis.

991 F.2d 1049, 1059 (2d Cir.1993) (emphasis added). In that case, the Second Circuit affirmed the district court's finding of public concern despite the fact that the record "strongly suggest[ed]" that the plaintiff spoke "solely to obtain additional towing referrals." *Id.* at 1060.

Moreover, the more a public employee's speech is removed from the workplace, the more difficult it will be for defendants to defeat First Amendment claims on grounds that the speech is akin to (to use Judge Posner's phrase) grousing about a raise. Indeed, I have doubts that the private motivation relied on by Hynes-the desire to sell a book-could ever extinguish a claim where the book itself was written, at least in part, to air matters of public concern. *See NTEU*, 513 U.S. at 466 ("Respondents' expressive activities in this case fall within the protected category of citizen comment on matters of public concern. . . . The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment."); *id.* at 480 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("In contrast to some of our prior decisions, this case presents no threshold question whether the speech is of public, or merely private, concern. Respondents challenge the ban as it applies to off-hour speech bearing no nexus to Government employment-speech that by definition does not relate to 'internal office affairs' or the employee's status as an employee.")

At any rate, it suffices to say here that I cannot, at the very least, rule as a matter of law that *Hollowpoint* does *not* address matters of public concern. It is a fair inference from

Reuland's contentions that he wrote *Hollowpoint* to, among other things, educate the public about the inner workings of a prosecutor's office and the various stages of, and players in, criminal investigations and prosecutions. If Hynes can prevail on this issue at all, a question I need not address now, it will only be if he prevails at trial on his contrary assertion about Reuland's motivation.[14]

In sum, whether a particular instance of speech is a matter of public concern is a question of law for the court to decide. *E.g.*, *Johnson*, 342 F.3d at 112. I deny Hynes's request for summary judgment on that issue with respect to *Hollowpoint.* Mindful of *Lewis v. Cohen'* s instruction that I "attempt to determine" the motivation of the speaker, 165 F.3d 154, 163-64 (2d Cir.1999), I will hear argument at trial on the question whether the dispute as to Reuland's motivation should be submitted to the jury. *See Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 557-58 (2d Cir.2001) (holding that, where "[b]oth sides' arguments rest heavily on the proper characterization of plaintiffs' speech and defendants' motives," the court should wait to come to its legal conclusions until after the factfinder has resolved the factual disputes); *cf. Frank v. Relin*, 1 F.3d 1317, 1329 (2d Cir.1993) (holding that summary judgment is inappropriate where the employer's motivation for the adverse employment action is in dispute).

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[14] Even then Hynes may not prevail. Perhaps because of the parties' focus on *Eberhardt* and the argument that the novel need not constitute speech on matters of public concern to fall within the First Amendment's protections, they have failed to argue the narrower question of what role, if any, motivation plays in analyzing whether speech unrelated to a government employee's work is a matter of public concern. A close reading of *NTEU* leaves me with doubts as to whether motivation has any role as to such speech. I need not decide that question now-indeed, it is not properly before me-but it may rear its head in Rule 50 motions at trial.

b. *The Statements to New York Magazine*

Hynes contends that Reuland's quote in *New York* magazine-that Brooklyn has "more dead bodies per square inch than anyplace else" (Foley Decl. Ex. P)-does not relate to a matter of public concern, as Reuland's motivation in making it was the promotion of *Hollowpoint.* Reuland counters that he made the statement because, in his view as an Assistant in Homicide, "there's a fair amount of work to be done" and he was "concerned." (Reuland Dep. at 221.)

Here as well, the subject matter of Reuland's statement-independent of his motivation for making it-is certainly a matter of public concern. The statement relates to the murder rate in Brooklyn.[15] *See Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir.1999) ("The comments . . . , which included speech on crime rates, police staffing, equipment shortages and related budgetary matters quite plainly involve matters of public concern."); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir.1994) ('Blum's speech advocating the legalization of marijuana, criticizing national drug control policy, and debating civil disobedience on its face implicates matters of public concern. The most cursory review of this court's docket will reveal that the abuse of and traffic in controlled substances is a major societal problem. The government's approach to this problem is, therefore, a matter of great importance . . . ."); *cf. Harman v. City of New York*, 140 F.3d 111, 118 (2d Cir.1998) ("[D]iscussion regarding current government policies and activities is perhaps the paradigmatic matter of public concern." (quotation marks and alterations omitted)).

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[15] Aside from the plain meaning of the quote, the record is replete with evidence that Hynes understood Reuland's comment to relate to Brooklyn's crime rate. (*See*, *e.g.*, Hynes Dep. at 20-21 ("Marty Markowitz [then-New York State Senator] . . . asked me if I had seen a New York Magazine article which had reference to [Reuland] and something about a skyrocketing murder rate in Brooklyn ."); Reuland Dep. at 219-20 (describing his discussion with Hynes in which Hynes told Reuland that he (Hynes) had reduced Brooklyn's crime rate and that therefore reading Reuland's quote in *New York* magazine was "hurtful")).

Hynes therefore focuses on the context in which Reuland made the statement to *New York* magazine, arguing that Reuland made the statement not to bring to light a matter of public concern, but rather solely to promote *Hollowpoint* and himself. Reuland contends otherwise. He responds that he was trying to explain that he "love[s] being a homicide prosecutor" because he "can make a difference" (Reuland Dep. at 222-23), and that "from [his] perspective as a homicide prosecutor," having spoken to victims of violent crimes, "there's a fair amount of work to be done" and he was "concerned" (*id.* at 220-21).[16] For the reasons set forth above, *see supra* Part B.1.a.iii, I cannot conclude as a matter of law that Reuland's statement did not address a matter of public concern.

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[16] Hynes contends that Reuland's sworn testimony at his deposition that he made the statement because he was concerned about crime (Reuland Dep. at 221) does not alone suffice to defeat summary judgment, despite volumes of caselaw requiring that courts not make credibility determinations at the summary judgment stage,

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c. *The Statements at the March 9, 2001 Meeting*

Hynes argues that Reuland's statements during their March 9, 2001 meeting did not relate to a matter of public concern. Specifically, Hynes contends that he called the meeting to inquire into Reuland's statements to *New York* magazine and that Reuland's statements were simply personal, internal, departmental disagreements as to where he would be assigned.

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but rather view the evidence in the light most favorable to the nonmoving party, *e.g.*, *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 558 (2d Cir.2001) (" 'Assessments of credibility and choices between conflicting versions of events are matters for the jury, not for the court on summary judgment." ' (quoting *Vital v. Interfaith Med. Ctr.*, 169 F.3d 615, 622 (2d Cir.1999))). When asked at oral argument what other evidence a plaintiff might present, Hynes's attorney offered, as an example, that a plaintiff might show that he had discussed the topic of the speech before or after the instance of speech at issue. Though I disagree with the suggestion that such additional evidence is necessary, I note that Reuland has presented it here. In the March 9, 2001 meeting called by Hynes to discuss the *New York* magazine quote, Reuland told Hynes (as set forth above) that despite the fact that Brooklyn's crime rate had fallen, "a fair amount of work" still needed to be done, and that he was "concerned." (Reuland Dep. at 221.) These statements-made four to six weeks after the *New York* magazine interview-lend further support to my conclusion that summary judgment in favor of Hynes is inappropriate on this record.

The Supreme Court has made clear that government employees do not forfeit their First Amendment protections if they decide to express their views privately rather than publicly. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414-16 (1979); *see also Ezekwo v. NYC Health & Hosps. Corp.*, 940 F.2d 775, 781 (2d Cir.1991) (citing *Givhan*, 439 U.S. at 414). Furthermore, despite Hynes's contentions, this meeting did not take place in the usual course of Reuland's employment. Hynes is clear in his deposition that after reading the quote in *New York* magazine, he "asked to see Mr. Reuland as soon as [he] could," in order to "determine why he would write [sic: say] something that was statistically and patently untrue." (Hynes Dep. at 22.) According to Reuland-whose account of the meeting I accept as true for purposes of this motion-Hynes began the meeting by explaining that he became the District Attorney to reduce crime in Brooklyn and that, having succeeded in doing that, remarks such as Reuland's in *New York* magazine were "hurtful." (Reuland Dep. at 219-20.) Reuland's account of his response, which I set forth again here for convenience, is as follows:

> I said that, um, I could appreciate everything that-that you're saying, um, but from my-from my perspective as a homicide prosecutor, as somebody who has spent the last few years dealing with families of homicide victims, victims of violent crime, going out literally to their homes, to their neighborhoods, speaking with them, their supervisors, their families, speaking for them, on trial. Um, from my perspective there's-there's a fair amount of work to be done. And, you know, I

> was concerned. And this was the motivating factors [sic] behind my remark.

(*Id.* at 220-21.)

These comments were not purely personal, nor did they relate only to Reuland's work assignment, as Hynes contends. I reject Hynes's argument that, as a matter of law, they did not address matters of public concern.

2. *Causation*

Having concluded that Hynes's motion cannot succeed on the public-concern prong of the *Mount Healthy* analysis, I proceed to address Hynes's arguments with respect to the third element Reuland must prove, i.e., that Reuland's speech was at least a substantial or motivating factor in the adverse employment actions, *e.g.*, *Johnson v. Ganim*, 342 F.3d 105, 112 (2d Cir.2003). Hynes advances two arguments with respect to causation. The first is that Reuland cannot show that *Hollowpoint* played a substantial or motivating role in Hynes's decisions to demote[17] and terminate Reuland, as there

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[17] Though his counsel retreated somewhat at oral argument, Hynes's memorandum in support of the motion suggests that Reuland's transfer out of Homicide was not a demotion. (*See* Def. Mem. Law Supp. Mot. Summ. J. at 15 ("Assuming, for the sake of argument, that transfer of plaintiff from the Homicide Bureau to the Orange Zone was an adverse employment action that was causally connected to protected speech . . . .").) That suggestion is rejected. Adverse employment actions include discharge and demotion. *E.g.*, *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999). There is

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is no evidence that Hynes read the novel. The second is that Hynes's decision to terminate Reuland came well after any protected speech, and in the interim Reuland's performance was unsatisfactory.

"Causation can be established either indirectly by means of circumstantial evidence, for example, by showing that the protected activity was followed by adverse treatment in employment, or directly by evidence of retaliatory animus." *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999). Where, as here, "questions regarding an employer's motive predominate in the inquiry regarding how important a role the protected speech played in the adverse employment decision," summary judgment is precluded. *Id.*

a. *Hynes Did Not Read* Hollowpoint

Hynes seeks summary judgment on the ground that Reuland has offered no evidence showing that Hynes actually read *Hollowpoint.* There is, however, evidence showing that many of Reuland's supervisors read the novel (*see* Anania Dep. at 96-97; Feinstein Dep. at 28; Reuland Dep. at 200-02), and a question of fact exists as to what, if anything,

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ample undisputed evidence in the record supporting the proposition that such a transfer was a demotion. (*See* Hynes Dep. at 27 (discussing Reuland's "request for a promotion" to Homicide); *see also* Anania Dep. at 142 (transfer from Red Zone to Homicide would be considered a promotion), 150 (transfer from Homicide to Orange Zone would be considered a demotion); Reuland Dep. at 195 ("[T]he position to which [all the Assistants] aspire is the homicide bureau. It's the most prestigious bureau in the office.").)

those supervisors related to Hynes regarding the substance of the novel. Reuland testified at his deposition that at their March 9, 2001 meeting-at which Hynes demoted Reuland-Hynes said to Reuland, "You sat there, you sat there in-in a chair and you told me that nothing in that book was going to hurt the office." (Reuland Dep. at 224.) This statement, if made, would allow a factfinder to conclude that Hynes's employment decisions as to Reuland were substantially motivated by the contents of *Hollowpoint.*

Moreover, even if Hynes neither read *Hollowpoint* nor was informed of its contents, he was required to make a reasonable investigation into its contents before deciding to take action against Reuland on its basis. *See Heil v. Santoro*, 147 F.3d 103, 109-10 (2d Cir.1998) ("[A]n employer that has received a report of such speech must make a reasonable investigation before deciding to take action against the employee." (citing *Waters v. Churchill*, 511 U.S. 661, 677-78 (1994) (plurality opinion))). Questions of fact therefore exist regarding what Hynes knew of the contents of *Hollowpoint* (whether or not he read it) and whether such knowledge prompted retaliatory employment action against Reuland.

b. *The Time Lapse*

Hynes seeks partial summary judgment as to Reuland's termination, arguing that Reuland cannot show that it was substantially motivated by the allegedly protected speech. In making this argument, Hynes relies heavily on the lapse of time.[18] Reuland was fired on July 20, 2001, about six months after the alleged distribution of advance copies of *Hollowpoint* within the District Attorney's Office; about five months after the February 26, 2001 *New York* magazine article; and about four and one half months after the March 9, 2001 meeting. I cannot conclude that this delay would, as a matter of law, preclude the necessary finding of causation.

In a related context, the Second Circuit "has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action." *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir.2001). The *Gorman-Bakos* court was "particularly confident," however, that "five months is not too long to support" an allegation of a causal connection, where plaintiffs provided evidence of retaliatory actions throughout that time period. *Id.* at 555; *see also Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 45-46 (2d Cir.1980) (holding that eight-month gap between EEOC complaint and retaliatory action suggested a causal relationship); *Suggs v. Port Auth.*, No. 97 Civ. 4026, 1999 WL 269905, at *6 (S.D.N.Y. May 4, 1999) (concluding that six months between filing EEOC complaint and firing suggests causal relationship).

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[18] To the extent Hynes premises this argument on Reuland's allegedly unsatisfactory performance after his demotion, I reject it. Hynes's characterization of Reuland's performance is hotly disputed, as are the underlying events that formed the basis of this characterization. These disputes are for a jury to sort out, and summary judgment is therefore inappropriate.

The question here is considerably easier. In the above-cited cases, the time gaps (e.g., eight months in *Grant*, 622 F.2d at 45-46, five months in *Gorman-Bakos*, 252 F.3d at 555) were deemed *short enough to establish a causal connection* between the protected activity and the retaliation. Here, however, Hynes, the defendant, is arguing that similar lengths of time are *so long* as to justify a finding that, as a matter of law, Reuland's speech *could not have been a motivating factor* in his decision to terminate Reuland. Therefore, applying *Gorman-Bakos* by analogy, Hynes's contention must fail.

3. *Hynes's Burden and the Pickering Balancing*

As Reuland has carried his initial burden, the burden shifts to Hynes to show by a preponderance that he would have taken the same adverse employment action "'even in the absence of the protected conduct.'" *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999) (quoting *Mount Healthy*, 429 U.S. at 287). The numerous disputed facts regarding Reuland's performance and Hynes's motivation preclude summary judgment on this issue. Furthermore, as Hynes does not allege that Reuland's speech disturbed the normal operations of the office, I need not weigh Reuland's free speech interest against Hynes's efficiency interest under *Pickering. See Hale v. Mann*, 219 F.3d 61, 72 (2d Cir.2000).

C. *Qualified Immunity*

Hynes alleges that he is entitled to qualified immunity for his actions. "The qualified immunity doctrine shields 'government officials performing discretionary functions . . .

from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. '" *Lewis v. Cowen*, 165 F.3d 154, 166 (2d Cir.1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "'[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). Therefore, Hynes "may prevail on his qualified immunity defense only if it was 'objectively reasonable for [him] to believe that his conduct did not violate [Reuland's] rights.'" *Johnson v. Ganim*, 342 F.3d 105, 116 (2d Cir.2003) (first alteration in original) (quoting *Savino v. City of New York*, 331 F.3d 63, 71 (2d Cir.2003)).

The qualified immunity inquiry requires a court to define the constitutional right at issue "with some specificity." *Lewis*, 165 F.3d at 167. "The relevant inquiry is not whether the defendants should have known that there was a federal right, in the abstract, to 'freedom of speech,' but whether the defendants should have known that the specific actions complained of violated the plaintiff's freedom of speech." *Id.* With respect to Reuland's claims, "it was established prior to 1985 that government employees had a right under the First Amendment, though not an unlimited right, to speak on matters of public concern." *Frank v. Relin*, 1 F.3d 1317, 1328 (2d Cir.1993) (citing *Connick v. Myers*, 461 U .S. 138, 146 (1983)). It was equally clear that the crime rate was a matter of public concern. *See United States v. Cone*, 354 F.2d

119, 127 (2d Cir.1965) ("[T]here is grave and growing public concern about the increasing ineffectiveness of law enforcement . . . ."); *cf. White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1060 (2d Cir.1993) ("[A] state police corps' performance of its duties is a matter of public concern . . . .").

"Nonetheless, even where the contours of the plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the acts complained of, the defendant may enjoy qualified immunity if it was objectively reasonable for him to believe that his acts did not violate those rights." *Frank*, 1 F.3d at 1328.

> In such a case, the defense will turn on the particular facts, and summary judgment will be appropriate only if the defendant adduces sufficient facts such that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for the defendant to believe that he was acting in a fashion that did not clearly violate an established federally protected right.

Id.; see also Johnson, 342 F.3d at 117 ("[T]he existence of these factual disputes precludes a meaningful resolution of the qualified immunity defense at the summary judgment stage.").

Here, if the facts are as Reuland alleges them to be, no reasonable actor in Hynes's position could have believed his actions were lawful. According to Reuland, he wrote a novel about important matters of public concern, and then spoke to the press and to Hynes personally about Reuland's concerns about the incidence of murder in Brooklyn. In retaliation for what Hynes perceived as criticism (or insufficient praise) of his efforts to fight crime in the borough, Hynes first demoted Reuland and then fired him. It was clear at the time Hynes acted that a government official could not lawfully engage in such retaliation, and no reasonable official could have concluded otherwise.

I hasten to reiterate that Hynes vigorously contests Reuland's version of the facts, but I must accept Reuland's version as true. Because Hynes's defenses to Reuland's claims, including his defense of qualified immunity, depend on favorable factual findings on issues requiring trial, his motion for summary judgment is denied.[19]

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[19] I note that, as a factual matter, Hynes's claim of qualified immunity does not involve the second part of the *Pickering* balancing test. That is, Hynes does not contend that Reuland was fired because his speech undermined the ability of the office to perform its public services; he says he fired Reuland because of poor work performance. Thus, Hynes does not seek immunity on the ground that he made an objectively reasonable (albeit perhaps erroneous) determination that the efficiency of the office's operations required that Reuland be fired. The same is true with respect to the demotion. Hynes contends that Reuland was demoted because he lied to Hynes, not because Hynes believed Reuland's speech impeded the office's work in any way.

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D. *Back Pay*

Hynes also seeks partial summary judgment on the issue of back pay, arguing that Reuland's salary did not change when he was transferred out of Homicide, and that Reuland failed to seek legal employment for almost two years after being discharged. In response, Reuland offers evidence that he mitigated by turning to writing as a full-time job, and monitored the legal market for employment opportunities. These disputed issues of fact regarding Reuland's efforts to mitigate must await resolution at trial.

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Similarly, as Hynes's lawyer made clear at oral argument, Hynes is not claiming that he actually concluded that Reuland's speech was not of "public concern," and that he therefore could discipline (or fire) him for it without facing the risk of a civil action for damages. To the contrary, Hynes insists that his actions were not motivated by Reuland's speech at all. (*See* June 7, 2004 Tr. at 32-33.)

I leave for further briefing at trial the question whether Hynes's subjective motivation in firing Reuland affects the qualified immunity analysis. *See Johnson*, 342 F.3d at 117 ("Though the qualified immunity inquiry is generally an objective one, a defendant's subjective intent is indeed relevant in motive-based constitutional torts such as the one alleged [here]. Otherwise, defendants in such cases would always be immunized from liability so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds. Where a factual issue exists on the issue of motive or intent, a defendant's motion for summary judgment on the basis of qualified immunity must fail.").

CONCLUSION

For the foregoing reasons, Hynes's motion is denied in its entirety. Jury selection and trial will occur on July 12, 2004 at 9:30 a.m.

So Ordered.

JOHN GLEESON, U.S.D.J.

Dated: June 17, 2004
Brooklyn, New York

APPENDIX F — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED DECEMBER 26, 2002

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 02-7572

ROBERT CHARLES REULAND,

Plaintiff-Appellee,

v.

Charles J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York, and Amy Feinstein, individually and in her capacity as First Assistant District Attorney for the County of Kings, New York,

Defendants-Appellants.

Dec. 26, 2002

Present CABRANES, POOLER and KATZMANN, *Circuit Judges*.

SUMMARY ORDER

Appeal from an April 12, 2002 order of the United States District Court for the Eastern District of New York (John Gleeson, Judge), denying the defendants' motion to dismiss on the basis of their qualified immunity from suit.

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court be and it hereby is **AFFIRMED.**

Robert Charles Reuland, a former assistant district attorney in the King's County District Attorney's Office, brought this action against his former employers, the District Attorney and First Assistant District Attorney of King's County, pursuant to 42 U.S.C. § 1983. Reuland claims that he was forced to resign in retaliation for (1) his having published a novel about a prosecutor in the Brooklyn District Attorney's Office, (2) comments that he made to *New York Magazine* while promoting that novel, and (3) statements he made to the District Attorney in defense of the comments he made to *New York Magazine.*

The defendants filed a motion for judgment on the pleadings on the ground that the speech at issue did not relate to a matter of public concern and that the defendants were entitled to qualified immunity. On April 12, 2002, the District Court entered a written order holding that "[t]he factual record is currently insufficient . . . to conclude as a matter of law that: (1) it was reasonable for defendants to predict that their workplace would be disrupted by Reuland's speech; (2) the potential disruptiveness of Reuland's speech would have been enough to outweigh the value of Reuland's speech; or (3) defendants took action against Reuland based on this potential disruption and not in retaliation for his protected speech." The District Court's order did not address whether the speech pertained to a matter of "public concern."

On May 8, 2002, the defendants timely filed this notice of appeal. On appeal, they argue only that the speech at issue was not protected because it did not pertain to a matter of "public concern."

In order to state a § 1983 claim for retaliation based upon the First Amendment, one must demonstrate that the relevant speech pertained to a matter of "public concern." *See, e.g., Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Ezekwo v. NYC Health & Hosps. Corp.*, 940 F.2d 775, 781 (2d Cir.1991); *but see Eberhardt v. O'Malley*, 17 F.3d 1023, 1026 (7th Cir.1994). Upon reviewing the record, we conclude that issues of fact and law remain that preclude us from resolving this question. In particular, it is perhaps arguable that the novel itself pertains to a matter of "public concern" and that it would have been objectively unreasonable for the defendants to have believed otherwise. *See, e.g., Patel v. Searles*, 305 F.3d 130, 135 (2d Cir.2002) ("[The qualified immunity] defense shields government actors from liability if they did not violate clearly established law, or if it was objectively reasonable for such actors to believe that their actions did not violate clearly established law."). Although Reuland has not pursued this particular argument—indeed, it was explicitly disavowed by Reuland's counsel at oral argument before us—we are unable to resolve the defendants' motion for judgment on the pleadings without considering it. And, because the District Court has not explicitly addressed the matter in the first instance and the novel has not been made part of the record on appeal, we are presently unable to determine whether it pertained to a matter of "public concern."

For the foregoing reasons, the April 12, 2002 order of the District Court denying the defendants' motion for judgment on the pleadings is **AFFIRMED**. On remand, the District Court may wish to consider the relevance *vel non* of the record to date, including the oral argument before this Court, in further proceedings. Those proceedings may include, at the discretion of the District Court, discovery on the limited question of qualified immunity and, at the discretion of the parties, renewed dispositive motions.

For the Court,
Roseann B. MacKechnie, Clerk

s/ Oliva M. George
by Oliva M. George, Deputy Clerk

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED APRIL 10, 2003 AND FILED APRIL 12, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

01-CV-5661 (JG)

ROBERT CHARLES REULAND,

Plaintiff,

-against-

CHARLES J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York, and AMY FEINSTEIN, individually and in her capacity as First District Attorney for the County of Kings, New York,

Defendants.

ORDER

JOHN GLEESON, United States District Judge:

Defendants' motion to dismiss pursuant to Rule 12(c) of the Federal Rules of Civil Procedure is denied. Defendants have not proved beyond doubt that Reuland can prove no set of facts in support of his claim which would entitle him to relief. *See Ad-Hoc Comm.*, 835 F.2d 980, 982 (2d Cir. 1987) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

With respect to the claim of qualified immunity, there is an insufficient factual basis for me to conclude that defendants would necessarily prevail. Liberally construed, Reuland's complaint alleges facts that, if proved, would establish that defendants denied his clearly-established rights under the First Amendment. The factual record is currently insufficient for me to conclude as a matter of law that: (1) it was reasonable for defendants to predict that their workplace would be disrupted by Reuland's speech; (2) the potential disruptiveness of Reuland's speech would have been enough to outweigh the value of Reuland's speech; or (3) defendants took action against Reuland based on this potential disruption and not in retaliation for his protected speech. *See Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995). The defense may of course be asserted again in a motion for summary judgment.

So Ordered.

s/ John Gleeson
JOHN GLEESON, U.S.D.J.

DATED: April 10, 2002
Brooklyn, New York

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 26, 2007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Number:	04-5521-cv
Short Title:	Reuland v. Hynes
DC Docket Number:	01-cv-5661
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable John Gleeson

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of February, two thousand seven.

ROBERT CHARLES REULAND,

Plaintiff-Appellee,

v.

CHARLES J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York,

Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Defendant-Appellant Charles J. Hynes. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: */s/* ____________________
Motion Staff Attorney

APPENDIX I — RELEVANT CONSTITUTIONAL PROVISION

THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

U.S. CONSTITUTION

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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No. 06-1601

FILED

AUG 1 - 2007

IN THE

Supreme Court of the United States

CHARLES J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York,

Petitioner,

v.

ROBERT CHARLES REULAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENT'S STATEMENT OF QUESTION PRESENTED

Is there a compelling reason to grant Hynes's Petition for Certiorari where the United States Court of Appeals for the Second Circuit correctly determined, based on settled law, that 1) a hyperbolic statement regarding crime rates, published outside the workplace, touches on a matter of public concern irrespective of the speaker's motive for making the statement, 2) there was no evidence of potential disruption of the workplace as a result of that statement, 3) the issue of potential disruption of the workplace was never submitted to the jury and was therefore waived by Petitioner, 4) the statement is therefore protected by the First Amendment, and 5) where that determination does not conflict, directly or otherwise, with the decisions of this Court or with the decisions of other Circuit Courts of Appeals?

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B. This Case Presents Neither A Novel Issue Nor One That Is Of Vital Governmental Importance: The Law is Well-Settled that Hyperbole, As Well As False Statements, Are Protected By The First Amendment; Further, Hynes Himself (As Opposed To His Attorneys On Appeal) Never Advanced The So-Called Falsity Of Reuland's Statement To *New York Magazine* As A Reason For Demoting Him 3

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D. At The Time Hynes Demoted Reuland, Settled Law Put Hynes On Notice That Reuland's Statement to *New York Magazine* Regarding The Crime Rate In Brooklyn Touched On A Matter Of Public Concern Irrespective Of The Fact That It Was Not Literally True And Irrespective Of His Motive In Making The Statement; Hynes Is Not Entitled To Qualified Immunity 9

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THERE IS NO COMPELLING REASON TO GRANT THE PETITION FOR CERTIORARI

A. Relying On *Connick v. Myers*, 461 U.S. 138 (1983) And *Pickering v. Board Of Education*, 391 U.S. 563 (1968), The Second Circuit Correctly Concluded That The Motive Of The Speaker Is Not Dispositive On The Issue Of Whether Speech Touches On A Matter Of Public Concern; That Ruling Does Not Conflict With Prior Rulings Of This Court Or With Rulings Of The Other Circuit Courts Of Appeals

While Hynes has framed the "question presented" on this Petition as whether the Second Circuit's ruling in this case directly conflicts with the rulings of this Court or the Courts of Appeals of the other Circuits, the body of the Petition makes reference not to an actual split among the Circuits, or among the Circuits and this Court, but to a "**potential split**"[1] among the Circuits on the issue of whether a speaker's motive is dispositive in determining whether speech is on a matter of public concern. See Petition for Certiorari, p. 12, 14.

However, as noted by the Court of Appeals for the Second Circuit in its decision in this case, only one Circuit Court "has **potentially** treated motive as dispositive, but has not explicitly so held." See Petition for Certiorari, Appendix A, p. 17a,[2] *citing Schalk v. Gallemore* 906 F.2d 491 (10th

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[1] Arguably, there could always be a "potential split" or "potential conflict" among the Circuits at any subsequent point in time.

[2] It is respectfully suggested that *Schalk v. Gallemore, supra.*, should not be read as even potentially treating motive as dispositive.

Cir, 1990). On the contrary, in *Schalk*, the Tenth Circuit determined that the employee's speech was protected under the First Amendment but granted the Defendant qualified immunity.

All of the Circuit Courts of Appeals which have **actually** resolved this issue have concluded, as has the Second Circuit,[3] that the speaker's motive is not dispositive as to whether an employee's speech relates to a matter of public concern. *Tripp v. Cole*, 425 F.3d 5, 11 (1st Cir. 2005) ("Where a public employee speaks out on a topic which is clearly a legitimate matter of inherent concern to the electorate, the court may eschew further inquiry into the employee's motives . . . ."); *Markos v. City of Atlanta*, 364 F.3d 567 (5th Cir. 2004) (noting that although motivation is often relevant, it is not "the new litmus test for the matter of public concern analysis, displacing the *Connick* factors"); *Anderer v. Jones*, 385 F.3d 1042 (7th Cir. 2004) ("We acknowledge that motive is relevant to the matter of public concern inquiry, though it is not dispositive."); *Alpha Energy Savers, Inc. v. Hansen,* 381 F.3d 917, 925 (9th Cir. 2004); ("[W]e have held that motive should not be used as a litmus test for public concern; rather, content is the greatest single factor in the *Connick* inquiry."); *Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3rd Cir. 1997) ("*Connick* indicates that the speaker's motive, while often a relevant part of the context of the speech, is not dispositive in determining whether a particular statement relates to a matter of public concern."); *Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 576 (6th Cir. 1997) ("The motive which underlies an employee's statements is a relevant, but not necessarily dispositive factor in considering whether an employee's statements may be fairly characterized as relating to any matter of political, social, or other concern to the community."); *Morris v. Crow*, 117 F.3d 449, 457 (11th Cir. 1997) ("An employee's motive for speech, while not dispositive, is a factor that must be considered in determining whether speech is a matter of public concern."); *Barnard v. Jackson County*, 43 F.3d 1218, 1226 (8th Cir. 1995); ("Insofar as self-interest is found to have motivated public-employee speech, the employee's expression is entitled to less weight in the *Pickering* balance than speech on matter of public concern intended to serve the public interest").

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[3] The Second Circuit noted that its previous cases suggesting that the speaker's motive might indicate that speech did not touch on a matter of public concern focused primarily on private motives related to workplace grievances. Petition for Certiorari, p. 14a

Thus, because the decision of the Second Circuit Court of Appeals in this case does not conflict with the decisions of other Circuit Courts of Appeals or with the decisions of this Court, there is no compelling reason to grant Hynes's Petition for Certiorari.

B. This Case Presents Neither A Novel Issue Nor One That Is Of Vital Governmental Importance: The Law is Well-Settled that Hyperbole, As Well As False Statements, Are Protected By The First Amendment; Further, Hynes Himself (As Opposed To His Attorneys On Appeal) Never Advanced The So-Called Falsity Of Reuland's Statement To *New York Magazine* As A Reason For Demoting Him

Contrary to Petitioner's assertion, this case presents neither a novel issue nor one that is of "vital governmental importance."

Reuland's statement, as published in *New York Magazine*, was "Brooklyn is the best place to be a homicide prosecutor" because "we've got more dead bodies per square inch than anyplace else." Petition for Certiorari, p. 4a.

Hynes's attempt on appeal to spin Reuland's statement into a "recklessly false statement," which, according to him, denudes the statement of First Amendment protection, should be rejected by this Court as it was by the United States Court of Appeals for the Second Circuit.

First, in its decision, the Court of Appeals for the Second Circuit accurately noted that there was no proof in the record that Reuland's statement was in fact false or that Reuland made the statement with knowledge of or reckless disregard for, its falsity. Petition of Certiorari, p. 9a-10a.

The Court went on to note that in any event, all parties conceded that the statement in question was hyperbole. See Petition for Certiorari, p. 9a.

In fact, the record demonstrates that prior to his appeal to the Second Circuit, Hynes never advanced the falsity, or lack of literal accuracy of, Reuland's statement to *New York Magazine*, as a reason for Reuland's demotion. It is thus not surprising that the District Court's decision on the parties' Rule 50 motions makes absolutely no reference to this issue. See Petition for Certiorari, pp. 37a-58a.

Rather, Hynes's claim, though rejected by the jury, was that he demoted Reuland in 2001 because he believed that Reuland had lied to him a year earlier regarding his motivations for wanting to be promoted to the Homicide Bureau.

When, for the first time at oral argument on appeal, Hynes's counsel advanced the contention that Reuland's statement did not touch on a matter of public concern because it was not true, the Court specifically requested that the parties submit Rule 28(j) letter briefs on this issue and as to whether the issues had been raised. Petition for Certiorari, p. 8a.

To the extent that this contention was considered by the Second Circuit, that Court relied on settled Supreme Court case law in holding that false speech, as well as hyperbole which could not reasonably be perceived as fact, is entitled to First Amendment protection. *N.Y. Times v. Sullivan,* 376 U.S. 254, 271 (1964), ("[E]rroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the breathing space they need to survive."); *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988) (parody that was not reasonably believable was protected by the First Amendment"); *Pickering v. Board of Education of Township High School Dist.*, 391 U.S. 563, 570-573 (1968).

Additional cases decided by this Court are in accord. *Buckley v. Valeo*, 424 U.S. 1(1976); *Rankin v. McPherson*, 483 U.S. 378 (1987). The First Amendment also protects statements which could not reasonably have been interpreted as stating actual facts [about the public figure involved], and merely rhetorical hyperbole. *Miklovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

Cases decided by the Second Circuit and other Circuits Courts of Appeals (as well as District Courts) have followed the lead of this Court. "Constitutional protection does not turn upon the 'truth, popularity, or social utility of the ideas and beliefs which are offered,' for 'erroneous statement is inevitable in free debate and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *X-Men Security, Inc. v. Pataki*, 196 F.3d 56, 69 (2nd Cir. 1999), *citing New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (*quoting N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

"A speaker is not required to prove the truth of an allegation for it to constitute a matter of public concern." *Skeehan v. Kelly*, 2005 WL 1023206, *12 (S.D.N.Y. 2005), *citing Farhat v. Jopke*, 370 F.3d 580, 591, n. 8 (6th Cir. 2004) (a public employee who "engage[s] in speech alleging public corruption [does not] have to prove the truthfulness *of that speech* in order to show it touches upon a public concern.") (emphasis in original); *Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933, 942 (7th Cir. 2004); *Buschi v. Kirven*, 775 F.2d 1240, 1248 (4th Cir. 1985) (relevant question is whether a comment, irrespective of its truth or falsity, touches on a matter of public concern); *Munafo v. Metro. Trans. Auth.*, 2003 U.S. Dist. LEXIS 13495, *36 (E.D.N.Y. 2003 (Korman, C.J.) ("[plaintiff] does not need to prove his complaints were accurate in order to sustain his claim for wrongful termination; retaliation in response to his speech is prohibited by the First Amendment regardless of its truth.").[4] *See also Salge v. Edna Independent School District*, 411 F.3d 178, 185 (5th Cir. 2005) ("whether an employee's speech is true or false plays no role in the determination whether the speech concerned a matter of public interest."), *citing Denton v. Morgan*, 136 F.3d 1038, 1043 (5th Cir. 1998).

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[4] The Sixth Circuit in *Farhat* cited to several previous Sixth Circuit decisions which similarly held truthfulness is not required to be proven in order for the statement at issue to be protected by the First Amendment. *See Farhat*, 370 F.3d at 591, n. 8, citing *Rodgers v. Banks*, 344 F.3d 587, 601, n.5 (6th Cir. 2003); *Chappel v. Montgomery Cty. Fire Prot., Dist. No. 1*, 131 F.3d 564, 576-577 (6th Cir. 1997) and *Williams v. Kentucky*, 24 F.3d 1526, 1535-1536 (6th Cir.), *cert. denied sub nom Allen v. Williams*, 513 U.S. 947 (1994).

Thus, settled precedent holds that the issue of whether Reuland's statement to *New York Magazine* was false or true is entirely irrelevant to the inquiry of whether that statement is protected by the First Amendment.

Finally, the cases cited by Hynes in support of the argument that Reuland's statement was not protected by the First Amendment lend absolutely no support to his position because they are completely inapposite. Those cases, involving "false speech" in the context of defamation of an individual, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), the application of the *Pickering* balance in holding that university's interest as an employer in disciplining an employee who presented fraudulent data outweighed her right to speak, albeit the speech touched on a matter of public concern, *Pugel v. Board of Trustees of the University of Illinois*, 378 F.3d 659 (7th Cir. 2004) and granting qualified immunity to an employer where the record demonstrated that the employer's adverse employment action was motivated **at least in part** by lawful considerations, *Stanley v. City of Dalton, Georgia*, 219 F.3d 1280 (11th Cir. 2000), have no application here.

C. Hynes Presented No Evidence Of Disruption Or Potential Disruption Of The Workplace As A Result Of Reuland's Statement To *New York Magazine*; In Fact At Deposition, Hynes's Two Top Assistants Denied Any Such Disruption And Denied That Hynes Ever Expressed Concern About The Potential For Such Disruption; Hynes Explicitly Waived The Issue Of The *Pickering* Balance At Trial And Should Not Be Permitted To Attempt To Inject That Argument By Indirection Here

Hynes does not directly argue that the *Pickering* balance should have tipped the scales in his favor in this instance; he cannot candidly do so since there was no evidence of any workplace disruption presented at trial which would permit that argument and in fact he explicitly waived this issue at trial. However, he makes two statements suggestive of office disruption in the Petition which require response here.

First, Hynes cites *Garcetti v. Ceballos*, __ U.S. __ 126 S.Ct. 1951 (2006), arguing that "employers have a heightened interest in controlling speech made by an employee in his or her professional capacity because supervisors need to ensure that their employees official communications are accurate, demonstrate sound judgment and promote the employer's mission." Petition for Certiorari, p. 20.

However, the record is clear that Reuland did not make his statement to *New York Magazine* in his official capacity. Petition for Certiorari, p. 10a.

Second, Hynes states "Reuland falsely and disingenuously exaggerated the homicide rate in Brooklyn, for purposes of his own self-promotion and to his employer's detriment." Petition for Certiorari, p. 23.

There is absolutely no basis in the record for any claim of "detriment" to Hynes or his office resulting from Reuland's statement.

D. At The Time Hynes Demoted Reuland, Settled Law Put Hynes On Notice That Reuland's Statement to *New York Magazine* Regarding The Crime Rate In Brooklyn Touched On A Matter Of Public Concern Irrespective Of The Fact That It Was Not Literally True And Irrespective Of His Motive In Making The Statement; Hynes Is Not Entitled To Qualified Immunity

Finally, Hynes's argument that he is entitled to qualified immunity is utterly meritless and therefore does not constitute a compelling reason to grant the instant Petition. His contention, reiterated in various forms over a number of pages is that he reasonably believed that "such a recklessly false statement, made by a prosecutor seeking to capitalize on his employment in the Homicide Bureau of the District Attorney's Office, in order to promote book sales, was not protected speech." Petition for Certiorari, pp 22-23.

As the Second Circuit wrote in its opinion, Hynes could be entitled to qualified immunity "only if it was objectively reasonable for him to believe that he could demote an assistant district attorney for making a hyperbolic statement about the crime rate" without violating his First Amendment rights. Petition for Certiorari, p. 21a.

First, prior to Hynes's demotion of Reuland in 2001, the United States Court of Appeals for the Second Circuit held that crime rates are inherently a matter of public concern. *See Morris v. Lindau,* 196 F.3d 102, 111 (2nd Cir. 1999), *citing Connick, supra.*

Second, although prior to appeal Hynes himself (as opposed to his counsel) never claimed that he demoted Reuland because his statement to *New York Magazine* was not true, even if that had been his testimony, the law was nevertheless settled at the time of the demotion that even false statements as well as hyperbole are protected by the First Amendment. *Pickering v. Board of Education of Township High School Dist.*, 391 U.S. 563, 570-573 (1968);[5] *see also* cases cited in Section B., *supra.*

Third, at the time of Hynes's demotion of Reuland, as set forth in Section A., *supra*, the law was sufficiently well established to put Hynes on notice that the motive of the speaker was not dispositive on the issue of whether the speech touched on a matter of public concern.[6]

To the extent that Hynes argues that "many of the cases cited by the Second Circuit" holding that the speaker's motive was not dispositive in determining whether speech touched on a matter of public concern, were decided after Reuland's 2001 demotion, at least an equal number of the cases cited by the Second Circuit were decided well before Reuland's demotion. See Section A, *supra* and Petition for Certiorari, pp. 21a-22a.

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[5] In a footnote, the Court in *Pickering* noted that it did not go as far as to decide the issue of whether a public employee's knowingly or recklessly making a false statement would still be protected by the First Amendment. *Pickering*, 391 U.S. at 575, n. 6. However, after *Pickering*, the U.S. Supreme Court in *Rankin* applied the principle that erroneous statements are still entitled to the protections of the First Amendment and specifically in the public employment arena.

[6] To the extent that any Courts have focused on the motive of the speaker, the issue has been whether the speech was calculated to redress personal workplace grievances. See for example, *Lewis v. Cowen*, 165 F.3d 154 (2nd Cir. 1999).

In addition, none of the Second Circuit cases on this issue which were decided prior to Reuland's demotion, suggested, as Hynes does, that motive alone is dispositive of the public concern issue especially where the motive is not to address an employment grievance. *White Plains Towing v. Patterson*, 991 F.2d 1049 (2nd Cir. 1993); *Blum v. Schlegel*, 18 F.3d 1005 (2nd Cir. 1994); *Lewis v. Cowen*, 165 F.3d 154 (2nd Cir. 1999); Petition for Certiorari, p. 15a.

Moreover, this Court, as well as the United States Court of Appeals for the Second Circuit held long before the facts which give rise to this case, that the fact that the motivation for speech may have been personal financial gain does not remove the speech itself from the purview of First amendment protection. *See United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("NTEU"); *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996) ("[i]t is well-settled that a speaker's rights are not lost merely because compensation is received.") Accord, *Chapel v. Montgomery County Fire Dist. No. 1,* 131 F.3d 574 (6th Cir. 1997).

Finally, Hynes did not request that the jury determine whether his demotion of Reuland was motivated by disruption (or even the potential for disruption) of his office rather than retaliation; indeed, there was no basis for that request in the record.

For all of the foregoing reasons, Hynes is not entitled to qualified immunity and there is thus no compelling reason to grant his Petition for Certiorari.

CONCLUSION

For the reasons set forth herein, Respondent Robert Charles Reuland respectfully asks that this Court deny Hynes's Petition for Certiorari.

Respectfully submitted,

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